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Early Pursuit of Justice: Extraordinary
Writs and Government Appeals
to the Military Appellate Courts

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

by Captain Mark W. Harvey, JA
United States Army

36th JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1988

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Writs and Government Appeals
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By Captain Mark W. Harvey

ABSTRACT: This thesis examines the history and application of extraordinary writs and government appeals by the military appellate courts. It also provides helpful hints regarding the preparation of government appeals and extraordinary writs by trial and defense counsel. This thesis concludes that counsel at the trial level should aggressively seek early review of the merits of appellate issues through the use of extraordinary writs and government appeals.

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I. INTRODUCTION

Over 100 years ago the Supreme Court stated, "<A> superior judicial tribunal...<can> require inferior courts and magistrates to do that justice which they are in duty and by virtue of their office bound to do."¹ The Court of Military Appeals eventually applied the Supreme Court's broad jurisdictional statement of supervisory authority to the military justice system. The Court of Military Appeals has used the vehicle of the extraordinary writ to apply its supervisory authority.

Historically, the Supreme Court and Court of Military Appeals have expressed concern regarding the broad potential limits of the supervisory authority that can be accorded in the military.² On the other hand, commentators have indicated that the Court of Military Appeal's refusal to review particular classes of cases is unnecessarily "restrictive."³

This thesis will examine the legal basis, jurisdiction, and historical growth of extraordinary writs and government appeals in the military justice system. A description of the mechanics of filing extraordinary writs and government appeals is provided. More aggressive use of extraordinary writs is urged because delay in the adjudication of an issue often severely prejudices the parties. The accused may suffer the impact of a legally erroneous conviction and confinement. Alternatively, the accused may receive an inappropriate windfall, dismissal of a legally appropriate specification.

In May 1950, Congress enacted the Uniform Code of Military Justice, 10 U.S.C. secs. 801-940 (1982) [hereinafter cited as UCMJ] and President Truman signed it into law,⁴ thereby establishing the Court of Military Appeals. The Court of Military Appeals is composed of three experienced attorney-judges, appointed by the

President with the advice and consent of the Senate.⁵ The Court of Military Appeals is required to review:⁶

- (1) All cases in which the sentence, as affirmed by a Court of Military Review, extends to death;
- (2) All cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and
- (3) All cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

For purposes of this article, ordinary relief means appellate review, under applicable statutes, of proceedings after action by the convening authority. Within the military judicial system, ordinary relief generally consists of:⁷

- (1) Appellate relief by a court of military review under UCMJ art. 69, upon request by the Judge Advocate General of the proceedings in any general court-martial, regardless of the sentence imposed.
- (2) Appellate relief by a court of military review under UCMJ art. 66, over court-martial proceedings in which the sentence, as finally approved by the convening authority, includes either confinement for at least a year or a punitive discharge.
- (3) Appellate relief by the Court of Military Appeals, under UCMJ art. 67, of proceedings finally decided by a court of military review.

Extraordinary relief, on the other hand, is a remedy not specifically authorized in the UCMJ. These remedies are afforded by means of common law extraordinary writs.⁸ This article will review the salient characteristics of common law extraordinary writs.

II. COMMON LAW WRITS

Although the common law of extraordinary writs has ancient origins, they continue to be used in both the military and civilian sectors.⁹ The most frequently used writs for the last twenty years are coram nobis,¹⁰ habeas corpus,¹¹ mandamus,¹² prohibition,¹³ and certiorari.¹⁴ The first four are employed in the courts of military review and Court of Military Appeals. Certiorari is limited to the United States Supreme Court.

A. MANDAMUS

The writ of mandamus is a command issued to an inferior court or officer to perform a specified act.¹⁵ Mandamus is available to "confine an inferior court to a lawful exercise of its prescribed jurisdiction,"¹⁶ or to compel it to carry out its duties.¹⁷ Mandamus is designed to compel performance of a ministerial duty,¹⁸ and the exercise of judicial discretion.¹⁹ Mandamus is not used to establish a right, rather it is used to enforce a right that is clear, complete, and established.²⁰ It is a "drastic instrument which should be invoked only in truly extraordinary situations."²¹ The party seeking the relief of mandamus has the burden of showing that he has a clear and indisputable right to the issuance of the writ.²² To reverse a discretionary ruling by mandamus requires more even than gross error, it must amount to a usurpation of power.²³

Traditionally, mandamus was available to the government, in criminal cases, to require exercise of jurisdiction where there was a refusal to act.²⁴ Courts also use mandamus in exceptional cases of emergency or public importance where the usual method of appeal is manifestly inadequate.²⁵

Two examples of successful writs of mandamus illustrate their value to the accused. In Cooke v. Orser,²⁶ the Court of Military Appeals granted mandamus relief, and directed the military judge to dismiss the charges because of a due process violation by the staff judge advocate and the convening authority. Likewise, in Powis v. Coakley,²⁷ the Navy Court of Military Review ordered an immediate review by the staff judge advocate, and action by the convening authority in order to expedite the accused's potential for clemency.

B. PROHIBITION

The writ of prohibition commands an inferior tribunal not to do something it is about to do.²⁸ Prohibition is used to prevent a tribunal from exercising jurisdiction over matters outside its own jurisdiction.²⁹ Competent jurisdiction by the superior tribunal is a prerequisite for prohibition to issue.³⁰ Restraint, rather than correction, is the essence of prohibition.

The military appellate courts have granted writs of prohibition on several occasions which illustrate their use in the military justice system. In Petty v. Moriarity,³¹ the Court of Military Appeals restrained the convening authority from referring charges to a particular level of courts-martial because the referral was based on improper reasons. In Fleiner v. Koch,³² the Court of Military Appeals prevented trial of an accused for an offense over which the military lacked jurisdiction.

C. HABEAS CORPUS

The term habeas corpus generically describes a variety of common law forms of the writ; however, the unqualified term in the civilian sector is used to describe the writ of habeas corpus ad subjucendum.³³ The

Supreme Court has declared that the Court of Military Appeals could issue emergency writs of habeas corpus ad subjucendum.³⁴

The purpose of habeas corpus ad subjucendum is to bring the detained person before the court for the purpose of inquiry into the legality of the detention.³⁵ Habeas corpus ad subjucendum is considered the highest legal remedy for any imprisoned person.³⁶ The lesser common law species of habeas corpus are designed to produce a person before the court for reasons unrelated to the legality of restraint.³⁷ Habeas corpus ad prosequendum is issued to remove a prisoner so that he may be prosecuted, and habeas corpus ad testificandum is issued to enable the prisoner to testify or to insure that the prisoner is tried in a court of proper jurisdiction.³⁸ These writs resemble regular criminal processes, rather than extraordinary writs as used in the military appellate system.³⁹

This article will discuss habeas corpus ad subjucendum (hereinafter habeas corpus) or the power to challenge the legality of confinement, rather than the lesser types of habeas corpus.

A statute specifically authorizing habeas corpus is generally considered a prerequisite for enforcement of this power.⁴⁰ The federal court system exercises habeas corpus under 28 U.S.C. sec. 2241;⁴¹ whereas, the Court of Military Appeals lacks specific statutory basis for providing habeas corpus relief to a military accused.⁴² The Court of Military Appeals obtains habeas corpus power from the general provisions of the All Writs Act.⁴³ Habeas corpus relief under the All Writs Act, rather than 28 U.S.C. sec. 2241, has only been used a few times in the civilian court system.⁴⁴

Typically military appellate courts review the propriety of pretrial confinement or lesser forms of pretrial restriction using the extraordinary writ of habeas corpus.⁴⁵ In order to expedite release from

pretrial confinement the Court of Military Appeals has not required that the petitioner exhaust his remedies before the Courts of Military Review.⁴⁶

Military appellate courts will review pretrial restrictions on liberty in addition to pretrial confinement. For example, in Richards v. Deuterman,⁴⁷ the Navy-Marine Court of Military Review ordered the military judge to review the basis and conditions of the accused's restriction to insure that it was appropriate and necessary.

The Court of Military Appeals will also review the propriety of deferring post-trial confinement pending decision on an extraordinary writ or completion of ordinary review. For example, in Collier v. United States,⁴⁸ the Court of Military Appeals found after an evidentiary hearing that a convening authority had abused his discretion in reconfining a convicted serviceman after the commander had initially granted the request for deferral of service of the sentence pending appeal.⁴⁹ Judge Darden's dissent in Collier indicated that the order the court was issuing was the so-called "great writ",⁵⁰ rather than the narrow type of habeas corpus authorized under the All Writs Act.⁵¹

None of the judges at the Court of Military Appeals has recently expressed concern in their opinions that the court lacked specific statutory authority to provide habeas corpus relief. For example, the Court of Military Appeals in Duncan v. Usher,⁵² ordered the accused's confinement deferred pending completion of review by extraordinary writ. Immediately after the court-martial sentenced the accused to confinement, the defense sought his release by extraordinary writ, arguing that the court-martial lacked in personam jurisdiction. Since the Court of Military Appeals temporarily had only two judges, and the vote was split, the court ordered the accused released from confinement pending appointment of an additional

judge. The Court of Military Appeals eventually decided that the court-martial lacked jurisdiction and set aside Master Sergeant Duncan's conviction.

The Courts of Military Review may also order release from confinement pending completion of appeal. For example, in Longhofer v. Hilbert,⁵³ the Army Court of Military Review granted a writ of habeas corpus ordering the convening authority to defer petitioner's confinement pending appellate review of the accused's case. In Washington v. Greenwald,⁵⁴ the Army Court of Military Review determined that habeas corpus was appropriate to insure that the accused received administrative credit for restriction tantamount to pretrial confinement. However, the administrative credit, if obtained, must result in release from confinement.

Not every error is sufficient to justify habeas corpus relief. For example, in Powis v. Coakley,⁵⁵ the Navy Court of Military Review found that the accused was prejudiced by inordinate delay in the convening authority's action. The Powis Court ordered the convening authority to immediately take action; however, the court refused to order the release of the accused from confinement.

Federal district courts, rather than military appellate courts, have the power to order the discharge of soldiers from the service by using habeas corpus.⁵⁶

D. ERROR CORAM NOBIS

An appellate court reconsiders a prior decision by using coram nobis. The writ of error coram nobis in military law is extraordinary relief based upon special or extraordinary circumstances which were not apparent when the court originally considered the case.⁵⁷ Alternatively, under coram nobis, a court can remedy an earlier

disposition of a case that is flawed because the court misperceived or improperly assessed a material fact.⁵⁸

The standard for obtaining relief through a writ of error coram nobis is more stringent than the standard applicable on direct appeal. The required degree of error must render the proceeding itself invalid.⁵⁹ The petitioner has the burden of showing that the earlier proceedings were incorrect.⁶⁰

Recognized grounds for coram nobis relief include lack of jurisdiction,⁶¹ retroactive application of a new procedural rule,⁶² and lack of mental capacity to commit the offense.⁶³

Coram nobis is not barred by the failure of the accused to initially petition the Court of Military Appeals for review,⁶⁴ or even by the accused's initial statement to the court that he did not desire to appeal his case.⁶⁵ The finality of the case under UCMJ art. 76, and orders discharging the soldier do not bar coram nobis relief.⁶⁶

The appellate court will deny coram nobis relief when the "exceptional circumstance" is a subsequent court decision, unless the subsequent decision has retroactive application.⁶⁷ Coram nobis relief is not barred by the failure of appellate counsel to raise the error during the previous review of the case.⁶⁸ However, the accused must establish that the error was unknown to him at the time of trial, and during appeal.⁶⁹ There is no time limit for filing a writ of error coram nobis.⁷⁰

E. CERTIORARI

Certiorari involves a limited review of the proceedings of inferior judicial tribunals and officers.⁷¹ The record of the terminated proceeding is certified by the inferior tribunal for review.⁷² Certiorari exists in both statutory and common law form.⁷³ Generally, only the

court of last resort within a judicial system has the power to issue certiorari.⁷⁴

Law courts have a general supervisory authority over inferior tribunals which is not entirely taken away by a statutory declaration of finality.⁷⁵ Certiorari is therefore available to obtain review of unappealable or otherwise unreviewable decisions in terminated cases.⁷⁶ Certiorari is a revisory writ, existing to correct errors of law apparent on the face of the record.⁷⁷ The military appellate courts do not use the term "certiorari." However, the military appellate courts utilize their supervisory powers to order appropriate relief as necessary under the particular circumstances of a case.

F. SUMMARY

Coram nobis, and certiorari attack proceedings where no further right of appeal exists,⁷⁸ and do not involve new parties.⁷⁹ Coram nobis is a continuation of the original proceedings, and not a separate action.⁸⁰ Habeas corpus collaterally attacks the proceedings of the lower court,⁸¹ involves new parties, and issues; and the question of guilt or innocence is not directly involved.⁸² A determination that restraint is illegal can have the collateral effect of voiding proceedings wherein restraint was imposed.⁸³

Mandamus and prohibition involve intervention by a superior court in a proceeding still before an inferior court or party.⁸⁴ The appellate court may terminate the proceeding by writ of prohibition, or compel exercise of jurisdiction by writ of mandamus.⁸⁵

The Court of Military Appeals and Courts of Military Review issue writs of mandamus, prohibition, coram nobis, and habeas corpus at the discretion of the court, and in aid of jurisdiction under the All Writs Act.⁸⁶

III. HISTORICAL APPLICATION OF THE ALL WRITS ACT

A. LEGISLATIVE DEVELOPMENT

Congress passed Section 14 of the Judiciary Act of September 24, 1789⁸⁷ creating the legislative predecessor of the All Writs Act.⁸⁸ The federal habeas corpus statute, 28 U.S.C. sec. 2241, also traces its origin to Section 14; however, from this common origin they have had separate statutory evolutions.⁸⁹

B. THE ALL WRITS ACT

The All Writs Act⁹⁰ is the source of authority for military extraordinary writs and reads in pertinent part: The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.⁹¹

C. CONSTRUCTION BY NONMILITARY FEDERAL COURTS

Congress intended the All Writs Act to achieve the ends of justice by issuing appropriate writs of an auxiliary nature in aid of courts respective jurisdictions as conferred by other provisions of law.⁹² Appellate courts traditionally regarded jurisdiction provided by the All Writs Act as ancillary and dependent upon primary jurisdiction independently conferred by other statutes.⁹³ By judicial interpretation, common law principles also operated to determine what writs are within the purview of the All Writs Act.⁹⁴ The common law requirement of exhaustion of remedies generally applies because historically extraordinary relief is improper where another adequate remedy is available.⁹⁵

An appellate court may invoke the All Writs Act if it has actual, or potential appellate jurisdiction. Under the potential jurisdiction theory, proceedings pending in an inferior court that may ultimately be appealed to the appellate court, trigger jurisdiction by the appellate court.⁹⁶ An appellate court may properly aid its potential jurisdiction by intervention at interlocutory stages of the lower court proceedings.⁹⁷

If a lower court exceeds⁹⁸ its own or usurps⁹⁹ another court's jurisdiction, fails to exercise its jurisdiction where it has a duty to act,¹⁰⁰ or acts to thwart or defeat ultimate appellate jurisdiction,¹⁰¹ then the appellate court has jurisdiction under the All Writs Act.¹⁰² Traditionally these goals were accomplished using the common law writs of certiorari, mandamus, or prohibition.¹⁰³

In 1954, the Supreme Court added coram nobis to the writs available under the All Writs Act.¹⁰⁴ The Supreme Court has relied upon 28 U.S.C. sec. 2241, rather than the All Writs Act for the habeas corpus power.¹⁰⁵

D. HISTORICAL ASSERTION OF POWER BY THE COURT OF MILITARY APPEALS UNDER THE ALL WRITS ACT

The Court of Military Appeals has vacillated over the existence and scope of the extraordinary writ power under the All Writs Act.

The Court of Military Appeals and civilian courts have interpreted the three parts to the All Writs Act.¹⁰⁶ First, the Court of Military Appeals quickly concluded that it was a court established by act of Congress.¹⁰⁷ Second, military appellate courts have struggled with interpretation of the term "in aid of their respective jurisdictions."¹⁰⁸ Both the federal court system and the military have failed to completely resolve interpretation of this continuing source of controversy. The Supreme

Court has interpreted this phrase to be an explicit recognition of ancillary powers dependent upon preexisting jurisdiction rather than an independent grant of jurisdiction.¹⁰⁹ Third, the Court of Military Appeals initially developed the term "agreeable to the usages and principles of law" into a doctrine of extraordinary circumstances and a requirement of exhaustion of available remedies.¹¹⁰ On a case by case basis, the Court of Military Appeals has granted extraordinary relief without exhaustion of available remedies in order to conserve judicial resources.

The Court of Military Appeals initially alluded to the possibility of application for extraordinary relief through the All Writs Act in United States v. Best.¹¹¹ The Court of Military Appeals decided Best in the third year of operation of the UCMJ, and immediately after the Supreme Court's decision in United States v. Morgan.¹¹² Through the 1950's and early 1960's the Court of Military Appeals continued to mention the possibility of extraordinary writs; however, circumstances in particular cases did not warrant extraordinary relief to any petitioner.¹¹³ In 1966, the Court of Military Appeals clearly stated for the first time in United States v. Frischholz,¹¹⁴ that it had extraordinary writ power. The Frischholz Court stated:

The fact that a court is empowered by Congress to act only in a specifically defined area of the law does not make it any less a court established by Congress. Part of our responsibility includes the protection and preservation of the Constitutional rights of persons in the armed forces. We entertain no doubt, therefore, that this Court is a court established by act of Congress within the meaning of the All Writs Act.¹¹⁵

The Court of Military Appeals reiterated the proposition that it had extraordinary writ power;¹¹⁶ however, it did not grant relief to an accused until 1968.¹¹⁷ In 1968 and 1969, the Court of Military Appeals granted relief in several other cases.¹¹⁸

In United States v. Bevilacqua,¹¹⁹ the Court of Military Appeals asserted that it was not powerless to accord relief to an accused who has palpably been denied his constitutional rights in any courts-martial.¹²⁰ The Court of Military Appeals, without analysis or analogy to the federal system in the opinion, expressly expanded its power beyond the limited mandate of UCMJ art. 67¹²¹ by allowing review of every court-martial regardless of the sentence adjudged.¹²²

Nine months after Bevilacqua was decided, the Court of Military Appeals abandoned this broad assertion of power to review all courts-martial. In United States v. Snyder,¹²³ the Court of Military Appeals returned to the traditional common law requirements for jurisdiction by stating that its power to issue writs under the All Writs Act was conditioned on potential or actual jurisdiction over the case on normal review.¹²⁴

The facts in Bevilacqua and Snyder are virtually identical. In both cases the accused received reductions in rank, but no confinement or punitive discharge from their special courts-martial. Appellate counsel filed writs of error coram nobis contesting subject matter jurisdiction. Although Snyder did not expressly overrule Bevilacqua, the legal principles in the two cases are in direct contradiction, and absolutely irreconcilable.¹²⁵

The Supreme Court apparently triggered this shift by the Court of Military Appeals in two 1969 cases. In United States v. Augenblick,¹²⁶ the Supreme Court implicitly acknowledged the power of the Court of Military Appeals to issue extraordinary writs and cited Bevilacqua without comment.¹²⁷ Subsequently, the Supreme Court, in Noyd v.

Bond,¹²⁸ explicitly acknowledged that the Court of Military Appeals had the power to issue extraordinary writs in cases which it could ultimately review.¹²⁹ The Noyd Court stated that it would be an entirely different matter if the Court of Military Appeals were not authorized to review the case under existing statutes, citing Bevilacqua with implicit disapproval.¹³⁰ However, in Parisi v. Davidson,¹³¹ the Supreme Court indicated that the Noyd caution was not intended to narrow Bevilacqua's view of the range of the Court of Military Appeal's extraordinary relief power.¹³² The decisions of the Supreme Court and Court of Military Appeals in 1969 settled the issue of whether the Court of Military Appeals had the power to issue extraordinary writs; however, the outer limits to this power of early review remained blurred.

Interpretation of the jurisdictional requirement that the court act "in aid of jurisdiction" is also important, and is best illustrated by its development in the federal sphere. The present interpretation is a merger of the two grants of authority.¹³³ One grant was historically related only to the Supreme Court, the power to issue writs of mandamus.¹³⁴ The second grant was related to all federal courts, the power to issue writs "which may be necessary for the exercise of their respective jurisdiction."¹³⁵ The first was considered an independent grant of power; however, the second was only considered to recognize powers ancillary to preexisting jurisdiction.¹³⁶ Essentially, both grants became merged by the Court of Military Appeals in McPhail v. United States.¹³⁷ The Court of Military Appeals' exercise of the supervisory function, as the highest court in the military judicial system, was as important to the safe guarding of a past exercise of its jurisdiction as it is to the preservation of the court's existing or future appellate jurisdiction.¹³⁸ The appellate court can exercise its writ powers to prevent an

illegal usurpation of judicial power by a lower court or person,¹³⁹ a deliberate refusal to enforce applicable law,¹⁴⁰ or a clear abuse of discretion.¹⁴¹ Appellate courts will not use mandamus power to correct an error of a lower court in a matter properly within the lower court's jurisdiction.¹⁴²

The appellate court must determine whether any relief to which the petitioner is entitled should await the review of his case on direct appeal.¹⁴³ If an accused asserts that his trial is barred because the court-martial lacks personal¹⁴⁴ or subject matter jurisdiction,¹⁴⁵ or because of a promise of immunity,¹⁴⁶ an extraordinary writ should be considered on its merits by the appellate court. If special circumstances such as recurrent issues that have been thoroughly briefed and argued are present, the court may consider the petition on its merits.¹⁴⁷ The Court of Military Appeals initially asserted that it had broad powers under the supervisory theory in United States v. Bevilacqua.¹⁴⁸ The Court of Military Appeals reaffirmed this power in McPhail v. United States,¹⁴⁹ and it has repeatedly cited the term, supervisory authority, as the basis for intervention in a variety of areas. The expansion of the Court of Military Appeals' involvement in regulating nearly all actions under the UCMJ has continued without significant retrenchment.

E. HISTORICAL ASSERTION OF POWER BY THE COURTS OF MILITARY REVIEW UNDER THE ALL WRITS ACT

Between 1970 and 1975, the debate regarding the extraordinary writ power primarily focused on the Courts of Military Review. UCMJ art. 66 provides for the Courts of Military Review as an appellate tribunal to review courts-martial for each military service. The Court of Military Appeals was expressly established by Congress under UCMJ art. 67. However, the Courts of Military Review

were argued to have been "created" by the Judge Advocate General's of the respective services.¹⁵⁰ In United States v. Draughon,¹⁵¹ the Army Court of Military Review, en banc, stated that it was a court within the meaning of the All Writs Act and that it had the power to grant extraordinary relief.¹⁵² The Air Force Court of Military Review agreed;¹⁵³ however, the Coast Guard Court of Military Review strongly disagreed.¹⁵⁴ In Henderson v. Wondolowski,¹⁵⁵ the Court of Military Appeals reserved opinion "respecting the applicability" of the All Writs Act to Courts of Military Review.¹⁵⁶ In 1975, the Court of Military Appeals agreed with the Army Court of Military Review by remanding a petition for extraordinary relief to the Army Court of Military Review so that it could exercise its own writ powers.¹⁵⁷

The Court of Military Appeals decided that Congress acted through the Judge Advocate General. Therefore, the Courts of Military Review are courts created by Congress.¹⁵⁸

IV. DEFINING LIMITS TO REVIEW UNDER THE ALL WRITS ACT

A. JUDICIAL REVIEW OF UNAPPEALABLE DECISIONS

1. Cases Decided Before May 31, 1951.

Since the Court of Military Appeals has no primary jurisdiction over cases decided prior to May 31, 1951,¹⁵⁹ it has no ancillary jurisdiction under the All Writs Act over these cases. Therefore, even coram nobis relief is not available for cases decided before May 31, 1951.¹⁶⁰

2. Cases with a Sentence of Less Than One Year Confinement, or Lacking a Punitive Discharge.

Historically, if the convening authority did not approve a punitive discharge or at least one year of confinement, the military appellate courts lacked

jurisdiction to consider the case.¹⁶¹ In Robison v. Abbott,¹⁶² the convening authority's action began with a statement that the sentence was approved, but then the convening authority commuted the bad-conduct discharge to confinement and the forfeitures to reduction. The Robison Court concluded that the convening authority's action did not constitute approval of the bad-conduct discharge for purposes of UCMJ art. 65. Therefore, the military appellate courts lacked jurisdiction.¹⁶³ In United States v. Bullington,¹⁶⁴ the Court of Military Appeals questioned the continued vitality of the Robison rule that conversion of a bad-conduct discharge could deny jurisdiction for military appellate courts.¹⁶⁵ In Bullington the convening authority initially approved a bad-conduct discharge and two months confinement at hard labor; however, the Court of Military Review set aside the sentence and directed the convening authority to either hold a rehearing or to disapprove the bad-conduct discharge and reassess the sentence.¹⁶⁶ The convening authority changed the bad-conduct discharge to two months confinement (increasing the total confinement to four months).¹⁶⁷ Upon rereview the Court of Military Review approved the convening authority's new action.¹⁶⁸ The Court of Military Appeals reviewed the case despite the absence of an approved bad-conduct discharge, and ordered a new sentencing hearing.¹⁶⁹

The Bullington Court stated that UCMJ art. 66(b) directs the Judge Advocate General to refer to a Court of Military Review the record in every case of trial by court-martial in which the sentence as approved extends to a bad-conduct discharge.¹⁷⁰ The Bullington Court, interpreting UCMJ art. 67(b)(3), stated, "(t)he Court of Military Appeals shall review the record in...all cases reviewed by a Court of Military Review in which upon petition of the accused and on good cause shown (emphasis in original)."¹⁷¹ However, if a record of trial is reviewed

by a Court of Military Review under UCMJ art. 69 there may be no further review by the Court of Military Appeals except upon an issue certified by the Judge Advocate General.¹⁷² This is the only exception to the rule that the accused can request and potentially obtain review in the Court of Military Appeals of any case reviewed by the Courts of Military Review.¹⁷³ In the 1985 cases of United States v. Wilson¹⁷⁴ and United States v. Browers,¹⁷⁵ the Court of Military Appeals determined that the Court of Military Review had jurisdiction to review cases which they had returned to the trial court or convening authority for additional proceedings, regardless of the sentence adjudged or approved below. The appellate court's desire is to insure enforcement of its earlier decision. The sentence ultimately approved by the convening authority is irrelevant to the jurisdiction of the appellate court.¹⁷⁶

In Bernard v. Commander,¹⁷⁷ the Navy Court of Military Review reviewed by extraordinary writ the allegation that the convening authority violated a pretrial agreement when he commuted a bad-conduct discharge to forfeiture of \$279 per month for six months and reduction to the pay grade E-1.¹⁷⁸ Since the most the convening authority could legally approve under the pretrial agreement was a suspended bad-conduct discharge, the Bernard Court determined that a bad-conduct discharge could potentially remain in some form after final action. Therefore, the Bernard Court had authority to review the petitioner's request for extraordinary relief because it was in aid of potential jurisdiction.¹⁷⁹

In United States v. McPhail,¹⁸⁰ the Court of Military Appeals granted a petition for extraordinary relief, directing the Judge Advocate General to vacate a conviction in a case which otherwise could not have been reviewed by the Court of Military Appeals because no bad-conduct discharge was adjudged.¹⁸¹ In McPhail the trial

judge dismissed the charges for lack of subject matter jurisdiction. The convening authority overruled the military judge's decision, and reinstated the charges.¹⁸² The court sentenced Sergeant McPhail to restriction for one month, and to perform hard labor without confinement for three months.¹⁸³ Sergeant McPhail was not sentenced to a punitive discharge by the special courts-martial. The convening authority approved the sentence and ordered it executed. Sergeant McPhail applied to the Judge Advocate General of the Air Force for relief from his conviction under UCMJ art. 69; however, the Judge Advocate General denied Sergeant McPhail's appeal.¹⁸⁴ The McPhail Court, granted the petition for extraordinary relief, and ordered the Judge Advocate General to dismiss the charges.¹⁸⁵ The McPhail Court declared:

[T]his Court is the supreme court of the military judicial system. To deny that it has authority to relieve a person subject to the Uniform Code of the burdens of a judgement by an inferior court that has acted contrary to constitutional command and decisions of this Court is to destroy the 'integrated' nature of the military court system and to defeat the high purpose Congress intended this Court to serve. Reexamining the history and applications of the All Writs Act, we are convinced that our authority to issue an appropriate writ in 'aid' of our jurisdiction is not limited to the appellate jurisdiction defined in Article 67. To that extent, our opinion in United States v. Snyder, 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969), was too narrowly focused...[W]e have jurisdiction to require compliance with applicable law from all courts and persons purporting to act under its authority.¹⁸⁶

Likewise, the Courts of Military Review have jurisdiction to review special courts-martial by extraordinary writ even when a punitive discharge is not

adjudged and confinement is less than one year.¹⁸⁷ Some commentators have attacked the McPhail opinion as being "questionable" and "unsettling."¹⁸⁸ Supervisory authority may be used by the Court of Military Appeals when the matter under review is "outside the jurisdiction of the court or the officer to which or to whom the writ is addressed."¹⁸⁹

3. Interlocutory Intervention to Prevent Jurisdictional Excess.

Since 1967 the Court of Military Appeals has asserted that it has the power to intervene in a court-martial and terminate proceedings by writ of prohibition.¹⁹⁰ Military appellate courts have provided mandamus, and prohibition relief on numerous occasions. For example, in Soriano v. Hosken,¹⁹¹ the Court of Military Appeals considered a petition for extraordinary relief contesting the military judge's ruling that a Philippine attorney could not represent his client before a special court-martial held in the Philippines.¹⁹² The Court of Military Appeals stated that although the Court of Military Appeals' authority to grant extraordinary relief has limits, "extraordinary relief can be invoked to rectify a trial ruling that is not within the power of the judge or the court-martial."¹⁹³

4. Review of Nonjudicial Punishment, Summary Court-Martial Cases, and Other Administrative Discharge Actions.

Historically, the Court of Military Appeals has held that it lacked jurisdiction to review nonjudicial punishment cases under UCMJ art. 15,¹⁹⁴ summary court-martial cases,¹⁹⁵ or administrative discharge determinations.¹⁹⁶ The Court of Military Appeals' present position regarding review of these areas by extraordinary writ is unclear because of the appointment of two new

judges to the Court of Military Appeals since the last relevant reported case.

The Court of Claims, the United States Claims Court, and the Boards for Correction of Military Records have engaged in review of nonjudicial cases under UCMJ art. 15.¹⁹⁷ Additionally, military appellate courts have determined whether nonjudicial punishment was validly imposed in order to determine admissibility of a record of that proceeding at courts-martial.¹⁹⁸ Military appellate courts have also flirted with the validity of the nonjudicial action itself.

In Stewart v. Stevens,¹⁹⁹ the Court of Military Appeals dismissed the petition of a sailor who had sought relief from his punishment under UCMJ art. 15 without explaining the rationale for the dismissal. Judge Cook, in a concurring opinion, explained that he was dismissing the petition because he was wrong in McPhail as to the scope of the court's extraordinary relief power. Judge Cook commented:

Writing for the unanimous Court in McPhail v. United States, 1 M.J. 457, 463 (C.M.A. 1976), I said that 'as to matters reasonably comprehended within the provisions of the Uniform Code of Military Justice, we have jurisdiction to require compliance with applicable law from the all courts and persons purporting to act under its authority.' Tested by that standard, this Court indubitably has jurisdiction to entertain, and decide the merits of petitioner's challenge to the validity of the Article 15 proceeding, if the prerequisites to grant extraordinary relief are present...I was wrong in McPhail as to the scope of this Court's extraordinary relief jurisdiction...

Judge Cook indicated that the basis for this "turnabout" was that the power of the Judge Advocate General to provide relief for courts-martial in proceedings other

than those provided for in UCMJ art. 67 was sufficiently broad to encompass extraordinary relief of the kind that would otherwise be within the jurisdiction of the Court of Military Appeals.²⁰⁰ According to Judge Cook, by explicitly investing the Judge Advocate General with corrective authority under UCMJ art. 69, Congress effectively withdrew authority to review the same cases from the Court of Military Appeals.²⁰¹ Judge Cook concluded that the court had "no jurisdiction to entertain a petition to inquire into the legality of Article 15 and Article 69 proceedings."²⁰² The only portion of the McPhail opinion that Judge Cook specifically rescinded was the portion that related "to matters reasonably comprehended within the provisions of the Uniform Code of Military Justice, we have jurisdiction to require compliance with applicable law from all courts and persons purporting to act under its authority."²⁰³ Although Judge Cook's position on the general supervisory power of the Court of Military Appeals remained unclear, Judge Cook expressly noted that the Court of Military Appeals lacked jurisdiction over UCMJ art. 15 actions.²⁰⁴

Chief Judge Fletcher, on the other hand, intimated that the court had jurisdiction over UCMJ art. 15 actions. However, Chief Judge Fletcher never found a situation justifying extraordinary relief, notwithstanding the discovery of legal errors in particular cases.²⁰⁵

Based upon the supervisory authority as expressed in McPhail, the Court of Military Appeals found jurisdiction to consider the limits of summary courts-martial,²⁰⁶ and whether an accused in pretrial confinement has a right to counsel.²⁰⁷

The Court of Military Appeals has considered entering the areas of administrative discharges and nonjudicial punishment under UCMJ art. 15; however, the court has consistently refused to reverse either of these actions.²⁰⁸ In Hollywood v. Yost,²⁰⁹ the Coast Guard Court

of Military Review considered the surrounding circumstances of an agreement between the accused and the convening authority regarding waiver of a sentence rehearing in return for an administrative discharge because the court needed to insure that its previous decision in the case was carried out properly.

Background political information may provide an explanation for the failure of the Court of Military Appeals to enter into review of UCMJ art. 15 cases. At the time Stewart v. Stevens was being decided by the Court of Military Appeals, the Department of Defense and some members of Congress were placing pressure on the Court of Military Appeals because of the court's activism.²¹⁰

In a scenario very similar to Stewart v. Stevens,²¹¹ the Court of Military Appeals in Dobzynski v. Green,²¹² reconsidered the propriety of the convening authority's withdrawal of charges from a special court-martial after the military judge had suppressed the incriminating evidence, and disposal of the case under UCMJ art. 15. Although Dobzynski did not seek review of the UCMJ art. 15 punishment, the majority stated that the UCMJ art. 15 punishment was "properly imposed."²¹³ Chief Judge Everett, strongly dissenting, said that Dobzynski's nonjudicial punishment was illegal, and that the court had jurisdiction to provide relief to Dobzynski.²¹⁴

Just as the Court of Military Appeals has moved closer to review of nonjudicial punishment under UCMJ art. 15, consideration of the impact of the collateral effects of courts-martial on administrative discharges has received increasing military appellate scrutiny. Characterization of an accused's record as either an acquittal or action equivalent thereto, constituting a bar to the potential administrative discharge was considered important because of its impact on administrative discharge proceedings.²¹⁵ In United States v. Browers,²¹⁶ the Court of Military Appeals refused to allow the

government to invoke the doctrines of ripeness and mootness to obtain dismissal of an appeal by the accused under UCMJ art. 62. The Browers Court held that the potential impact of the characterization of the court-martial as an "acquittal" on the accused's potential for administrative discharge provided the requisite jurisdiction.

In 1983, Congress made a comprehensive reexamination of the UCMJ and took no action as to the military appellate court's interpretation of the extraordinary writ authority. This inaction is arguably evidence that Congress affirmatively intended to preserve the military appellate court's interpretation of the scope of the All Writs Act.²¹⁷

When the accused files an extraordinary writ after sentence has been adjudged, the court will require the accused to demonstrate that the normal process of appeal is inadequate.²¹⁸ Even if direct appeal will eventually occur, the court may exercise of extraordinary writ jurisdiction to expeditiously resolve recurrent issues provided the issues have been thoroughly briefed and argued.²¹⁹

V. FREQUENCY OF EXTRAORDINARY WRITS AT THE COURT OF MILITARY APPEALS

Statistics illustrate that in recent years military accused have filed very few petitions for extraordinary relief at the Court of Military Appeals. Furthermore, the vast majority of petitions filed were denied or dismissed.

The total petitions for extraordinary review filed with the Court of Military Appeals from 1980 to 1985 is as follows:

<u>YEAR</u>	<u>PETITIONS</u>
1980	47 ²²⁰

1981	59 ²²¹
1982	56 ²²²
1983	72 ²²³
1984	44 ²²⁴
1985	38 ²²⁵

By Year Filings by type of writ:

Miscellaneous Docket 1983²²⁶ 1984²²⁷ 1985²²⁸

Coram nobis:	1	2	3
Habeas corpus:	13	10	5
Mandamus/Prohibition:	44	19	16
Other writs:	3	7	8
<u>Writ appeals(CMR):</u>	<u>11</u>	<u>6</u>	<u>6</u>
TOTAL WRITS	72	44	38

Writ Terminations: 1983²²⁹ 1984²³⁰ 1985²³¹

Withdrawn:	0	2	0
Remanded:	2	0	1
Granted:	3	1	2
Denied:	52	33	33
<u>Dismissed:</u>	<u>24</u>	<u>7</u>	<u>1</u>
Total: ²³²	81	43	37

The Court of Military Appeals' treatment of extraordinary writs is not statistically different from the handling of direct appeals. Only 10-15% of petitions in the normal course of review were granted for fiscal 1983-1985, and very few of these provided significant relief to the accused.²³³

VI. EXTRAORDINARY WRITS TO THE UNITED STATES SUPREME COURT FROM THE MILITARY JUSTICE SYSTEM

The Military Justice Act of 1983,²³⁴ provided for the first time review of military court convictions through certiorari to the Supreme Court from decisions of the Court of Military Appeals.²³⁵ Any case the Court of Military Appeals has considered or reviewed is subject to further Supreme Court review.²³⁶ The accused receives free representation by military appellate counsel before the Supreme Court and military appellate courts.²³⁷

Prior to this amendment of UCMJ art. 67, Article III Courts did not review courts-martial, except by collateral attack.²³⁸ Appeals to the Supreme Court had to pass through the United States District Courts and Courts of Appeals or through the Claims Court.²³⁹ Collateral attack took various forms, such as suits for back pay, petitions for writ of habeas corpus, declaratory judgments, injunctive relief, and mandamus.²⁴⁰ Observers anticipated that only a very small number of cases would be reviewed by the Supreme Court,²⁴¹ and in four years the Supreme Court has only reviewed two courts-martial.²⁴²

VII. TECHNICAL ASPECTS OF FILING EXTRAORDINARY WRITS

A. REPRESENTATION BY MILITARY APPELLATE COUNSEL

The military or former military accused should always personally request representation by military appellate

counsel to assist with filing the extraordinary writ. The Judge Advocate General, through his subordinates, appoints military appellate counsel that have special expertise in preparing and submitting extraordinary writs to the military appellate courts. This help may be crucial in obtaining review by the appellate court.

The accused should seek an attorney-client relationship at the appellate level in accordance with the authority contained in UCMJ art. 70.²⁴³ Following appointment of military appellate counsel, the accused should maintain personal contact with his appellate attorney.

The appellate courts have stated that the military accused does not have an endless right to military counsel to assist in overturning his court-martial conviction. However, the appellate courts have not indicated the circumstances under which the court will refuse to provide free military appellate counsel.²⁴⁴ Even if the accused has been discharged from the service years before the writ of error coram nobis is filed with the military appellate court, free military appellate counsel will be appointed, to assist with the writ.²⁴⁵

B. EXHAUSTION OF AVAILABLE REMEDIES

Appellate efficiency is enhanced when disputes are resolved locally without involving the military appellate courts. Counsel should seek redress before the trial judge prior to filing an extraordinary writ before the appellate courts. The Court of Military Appeals has urged submission of cases to the Court of Military Review, rather than directly to the Court of Military Appeals. However, there is no limitation on petition^{ing} directly to the Court of Military Appeals.²⁴⁸ The Court of Military Appeals has discussed the doctrine of exhaustion of remedies; however, the court has considered writs even

though the issue was not litigated at trial or before the Courts of Military Review.

In order to conserve judicial resources, the Court of Military Appeals has acted to quickly resolve a case despite failure to exhaust remedies. For example, in Burt v. Schick,²⁴⁷ the military judge erroneously declared a mistrial at the trial counsel's request because the defense counsel asked the appellant's alleged accomplice about his sentence in a prior court-martial. After the case was rereferred to court-martial, but prior to making a motion before the military judge to dismiss for double jeopardy, the appellant successfully obtained extraordinary relief from the Court of Military Appeals.²⁴⁸

C. OBTAINING A CONTINUANCE TO ALLOW TIME TO FILE THE EXTRAORDINARY WRIT

The trial defense counsel should request a continuance from the trial judge to obtain time to petition the appellate courts. If the trial judge denies the requested continuance, the defense counsel should renew the request at each appellate level. The appellate courts can intercede in an on-going prosecution to prohibit trial until the particular issue before the appellate court is resolved.²⁴⁹ The accused may seek a stay in United States District Court pending resolution in military appellate courts.²⁵⁰ The accused may also seek a stay by the Court of Military Appeals until the action has been decided by the Air Force Board for Correction of Military Records, or by the United States District Court.²⁵¹

D. PREPARATION OF THE EXTRAORDINARY WRIT

The Rules of Practice and Procedure for the Court of Military Appeals and the Courts of Military Review provide the specific rules regarding time limits, format, service, and content of the application for extraordinary writ.²⁵²

In an extraordinary writ application, a strong statement of the reasons why the court should take jurisdiction rather than waiting for direct appeal is important.²⁵³

Compliance with the court's time,²⁵⁴ and page limits,²⁵⁵ and rules regarding submission of extra record matters²⁵⁶ is crucial. Careful attention to punctuation, spelling, accuracy of statement of facts, and legal support will make a favorable impression on the court, and enhance chances of success.²⁵⁷

VIII. NATURE OF RELIEF

The four types of common law extraordinary relief, habeas corpus, mandamus, prohibition, and coram nobis previously discussed are available to military accused in appropriate cases.²⁵⁸ A petitioner may also ask for other appropriate relief.²⁵⁹ Review of the subject matter areas where relief has been granted or declined provides guidance to the military trial practitioner regarding the appropriateness of filing for an extraordinary writ in particular cases. The expansion of extraordinary writ jurisdiction, and consideration of new substantive areas by the Court of Military Appeals should encourage the trial practitioner to seek extraordinary relief.

A. SUBSTANTIVE AREAS NOT AMENABLE TO EXTRAORDINARY WRITS

In a number of cases the Court of Military Appeals has decided that extraordinary relief is not justified because the accused may obtain adequate relief at trial or through the normal appellate process. In the vast majority

of cases the appellate court will summarily deny the requested extraordinary writ; however, in other cases the appellate court has provided some explanation for the court's refusal to consider the merits of the extraordinary writ.

The Court of Military Appeals has held that an erroneous determination that requested counsel is not available does not preclude a court-martial from proceeding with trial. If the military judge determines that an accused has a right to appointment of a particular military counsel, the military judge should indicate on the record his basis and decision regarding appointment of counsel.²⁶⁰ If the accused is convicted at court-martial, then he may appeal the adverse determination of unavailability by the normal route of direct review, rather than by extraordinary writ.²⁶¹

The majority of the Court of Military Appeals determined that the qualification of foreign counsel to represent a military accused at courts-martial is a matter for examination during the normal course of direct review, rather than by extraordinary writ.²⁶²

Military appellate courts will rarely order the military judge to sever the charges, to clarify a specification, or to order the production of a witness regarding an admitted laboratory report.²⁶³ Nor will the appellate court compel the military judge to grant a continuance unless the appellate court is staying the court-martial to allow the appellate court to consider the extraordinary writ on its own merits.²⁶⁴

Appellate courts will rarely interfere by extraordinary writ with the appointing authority's choice of UCMJ art. 32 investigating officer, or the actions of the investigating officer.²⁶⁵

The appellate court will not order the Staff Judge Advocate to prepare a new pretrial advice, or interfere in the convening authority's decision to refer a particular

case to court-martial unless the act was clearly improper.²⁶⁶

B. SUBSTANTIVE AREAS AMENABLE TO EXTRAORDINARY WRITS

1. Deferment of Post-Trial Confinement.

The extraordinary writ of habeas corpus is appropriate to compel the official that has custody of the accused to defer post-trial confinement pending completion of appeal. The accused must affirmatively apply for deferment of confinement. The convening authority or general court-martial convening authority has sole discretion to decide whether to defer of post trial confinement.²⁶⁷ Although there is no constitutional right to be free pending appeal,²⁶⁸ there is a traditional right to bail pending appeal which Congress and most states have codified.²⁶⁹ This right is granted in the discretion of the decision authority and is based upon weighing of several factors against a set of standards.²⁷⁰ In Reed v. Ohman,²⁷¹ the Court of Military Appeals opined that the decision to restrain after trial is reviewable for abuse of discretion. The convening authority's discretion under UCMJ art. 57(d) is not unfettered.²⁷² The accused should request that the convening authority provide the basis for any denial of the deferment request, and the convening authority should provide the requested rational for his decision.²⁷³ The Court of Military Review has also reviewed the decision not to defer confinement.²⁷⁴ However, standards have not been firmly established for reviewing the deferment decision.²⁷⁵ The Court of Military Appeals has noted that the Senate Report accompanying the change made in UCMJ art. 57 in the Act of 1968 stated that the convening authority's discretion should be very broad and vested exclusively in the convening authority or the officer exercising general court-martial jurisdiction.²⁷⁶ Such commanding officers should take into consideration

all relevant factors in each case and grant or deny deferment based upon the best interest of the individual and the service. The best interest of the individual and the service may be considered consistent with the Bail Reform Act.²⁷⁷ Deferment should not be denied unless a threat to the safety of the community or a risk of flight exists which cannot be obviated by lesser forms of restriction or conditions on release.²⁷⁸ Once release from confinement is requested by the accused, the burden is on the government to show why release from incarceration pending appeal should not be granted.²⁷⁹ The Supreme Court has stated, "Where an appeal is not frivolous or taken for delay, bail 'is to be denied only in cases in which, from substantial evidence, it seems clear that the right to bail may be abused or the community may be threatened by the applicant's release.'"²⁸⁰ Counsel should normally request deferment, if the accused is confined, pending decision on the extraordinary writ.²⁸¹

The only practical recourse to denial of a request for deferment of confinement pending appeal is by extraordinary writ because direct appellate review under UCMJ art. 67 is wholly inadequate to remedy illegal confinement already served.²⁸² Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1101(c)(3) [hereinafter cited as R.C.M.] provides a multitude of factors which may be considered in deciding whether deferment is appropriate.²⁸³ Ultimately, a balancing test is used based on the particular facts of each case.²⁸⁴

2. Pretrial Confinement or Restriction.

If release from pretrial confinement is appropriate, then the appellate court will order habeas corpus relief. Early habeas corpus cases established that a commander's decisions regarding pretrial confinement were subject to judicial review for abuse of discretion.²⁸⁵ However, the appellate courts were concerned about the absence of

jurisdiction prior to referral to court-martial. Statutory provisions failed to provide the military judge with authority over a case until after the case had been referred to trial.²⁸⁶ By 1975, the Court of Military Appeals was ordering cases referred to court-martial in order to allow the trial judge to review the decision to place the accused into pretrial confinement.²⁸⁷ In 1976, the Court of Military Appeals began to require review of pretrial confinement decisions by a neutral and detached magistrate.²⁸⁸

If the magistrate refuses to order the release of the accused from pretrial confinement, the accused may appeal the magistrate's decision to the trial judge. If the trial judge refuses to order the accused's release from pretrial confinement, then the accused can attack this decision by using an extraordinary writ to the military appellate courts.²⁸⁹

The defense should litigate illegal conditions in pretrial confinement facilities before the trial judge.²⁹⁰ If the military judge denies the defense motion, then the defense should apply to the military appellate courts by extraordinary writ.²⁹¹

3. Double Jeopardy.

If a new trial is barred by double jeopardy,²⁹² then filing a writ prohibiting the court-martial is appropriate. In Burt v. Schick,²⁹³ the military judge erroneously declared a mistrial at the trial counsel's request because the defense counsel asked the appellant's alleged accomplice about his sentence in a prior court-martial. The Court of Military Appeals ruled that jeopardy had attached and retrial was barred.²⁹⁴

4. Lack of Personal Jurisdiction.

If the military lacks personal jurisdiction over an accused because the person has been discharged, is a civilian, or was never lawfully ordered to active duty, then an extraordinary writ prohibiting trial should be submitted to the military appellate courts after litigation before the trial judge.²⁹⁵ For example, in Duncan v. Usher,²⁹⁶ the Court of Military Appeals determined that the military lacked in personam jurisdiction because the accused, had a break in service between the offense and his trial. The Duncan Court used a writ of prohibition to order the government not to court-martial Master Sergeant Duncan.

5. Administrative Credit for Restriction Tantamount to Pretrial Confinement, and Other Confinement Issues.

The accused may apply for habeas corpus relief if he has not received administrative credit for pretrial restriction tantamount to pretrial confinement or administrative credit for pretrial confinement. However, this administrative credit must result in release of the accused from confinement to merit habeas corpus.²⁹⁷

Military appellate courts have granted extraordinary relief where the convening authority delayed his post trial review,²⁹⁸ and in other discretionary situations involving where and how the accused is confined.²⁹⁹

6. Immunity.

If the accused relies on a promise by a government representative not to prosecute at court-martial, the accused may seek enforcement of this promise by seeking a writ of prohibition.³⁰⁰

7. Investigation.

The Court of Military Appeals will enforce a military judge's order that the convening authority pay for the transportation of an accused and his detailed military counsel in order to prepare for trial.³⁰¹

8. Improper referral to UCMJ art. 32.

The Court of Military Appeals enjoined a UCMJ art. 32 investigation because the investigation was initiated for improper reasons. In Petty v. Moriarty,³⁰² the accused was referred to a special court-martial. After Petty's defense counsel requested defense witnesses, the convening authority withdrew the charges and referred Petty to a UCMJ art. 32 investigation. The Court of Military Appeals prohibited the UCMJ art. 32 investigation because the convening authority's action was not consistent with the orderly administration of justice.³⁰³

IX. CONCLUSION

Initially, the military appellate courts were very reluctant to provide extraordinary relief to the military accused. For several years, the Court of Military Appeals held that it had the power to grant extraordinary relief; however, the court failed to find any cases meriting relief. The Supreme Court approved the use of extraordinary writs by the Court of Military Appeals, and the Court of Military Appeals began to occasionally provide relief.

The outer limits to the extraordinary relief power remain unclear. The Court of Military Appeals has declined to review nonjudicial actions under UCMJ art. 15, summary courts-martial, and administrative discharge actions. If the facts are sufficiently egregious, the Court of Military Appeals may dispose of this barrier under the supervisory theory of review.

The supervisory theory of review is broad enough to provide an opportunity for success to any accused that has facts that strongly support early relief.

PART II: GOVERNMENT APPEALS BY EXTRAORDINARY WRIT

I. HISTORICAL REVIEW

In 1892, the Supreme Court in United States v. Sanges,³⁰⁴ considered the concept of a government appeal of an adverse trial decision as "a serious and far reaching...innovation in the criminal jurisprudence of the United States."³⁰⁵ The Sanges Court refused to allow a government appeal without a Congressional enabling statute.³⁰⁶ In 1902, Congress passed the first Criminal Appeals Act.³⁰⁷ Congress was concerned about the plight of a criminal defendant exposed to additional expense and anxiety by a government appeal and the possibility of multiple trials.³⁰⁸ Congress limited the right of government appeal to three statutorily defined categories.³⁰⁹ The primary limitation was to cases of public importance.³¹⁰ The Criminal Appeals Act required the government to appeal within thirty days of the trial court's decision, and to prosecute the case with diligence.³¹¹ Even if the verdict was based upon an erroneous legal theory, the government could not appeal a verdict in favor of the accused.³¹² If jeopardy attached by the impaneling of the jury, the government could not appeal.³¹³

Between 1907 and 1970, the Criminal Appeals Act remained essentially unchanged.³¹⁴ Government appeals occurred in the unusual or exceptional case.³¹⁵ In 1970, the Supreme Court expressed its strong "dissatisfaction" with the Criminal Appeals Act.³¹⁶ Congress responded by amending the Criminal Appeals Act through Title III of the Omnibus Crime Control Act of 1970.³¹⁷ Congress permitted

the government to appeal interlocutory orders suppressing or excluding evidence or requiring the return of property, and from orders dismissing an indictment, except where prohibited by double jeopardy.³¹⁸ Subsequently, Justice Marshall stated that the legislative history of the amended Criminal Appeals Act revealed that Congress intended to remove all statutory barriers to government appeals, whenever the Constitution would permit.³¹⁹

The military appellate courts have vacillated on whether the government can seek relief through extraordinary writs. In the 1968 case of United States v. Boehm,³²⁰ the Court of Military Appeals construed UCMJ art. 62(a) to allow the government a review like 18 U.S.C. sec. 3731, which authorizes an appeal in a criminal case by the government.³²¹ Eight years later the Court of Military Appeals concluded that UCMJ art. 62 did not authorize an appeal which could result in reversal of the trial court's action, but merely permitted a request for reconsideration of the matter by the trial judge.³²²

Three years later in Dettinger v. United States,³²³ the Court of Military Appeals decided that the UCMJ disclosed "no legislative purpose to forbid the military appellate courts from considering an application for extraordinary relief from a trial judge's action" by the Government.³²⁴ The Courts of Review are the highest tribunal in the services court-martial system, and therefore have judicial authority over the actions of trial judges in cases that may potentially reach the appellate court.³²⁵ The Dettinger Court commented that the Courts of Military Review can confine inferior courts within their systems to a lawful exercise of their prescribed jurisdiction.³²⁶ The Court of Military Appeals in Dettinger upheld the military judge's dismissal of the charges for lack of compliance with an Air Force Regulation's speedy trial provisions commenting:

(t)he office of the extraordinary writ is not to control the decision of the trial judge. On the facts of record, another judge might, perhaps, reach a different conclusion as to the unreasonableness of the delay, and as to the corrective action required. However, no violation of statute or decisional law or any provision of the Air Force Manual appears in the actions taken by the respective trial judges in these cases. Consequently, no grounds exist for extraordinary relief from those decisions.³²⁷

If the challenged action was merely legally questionable, the appellate court would not consider a government appeal.³²⁸ The standards for award of relief on appellate review of a court-martial conviction are lower than those governing extraordinary relief.³²⁹

Applying Dettinger, the Navy Court of Military Review in United States v. Redding, refused to overturn the military judge's decision regarding availability of individual military counsel despite a finding that the military judge's determination of availability "was erroneous."³³⁰ The Court of Military Appeals decided that a party adversely affected by the decision of a Court of Military Review could appeal to the Court of Military Appeals.³³¹ The Redding Court concluded that the military judge's dismissal of the charges because the command had failed to make available individual military counsel was not authorized by law or judicial precedent.³³² Judge Redding's action was "completely outside the established legal framework that surrounded the order of dismissal in the Dettinger case."³³³ The Redding Court returned the case to the Judge Advocate General of the Navy for submission to the Navy Court of Military Review.³³⁴ The Redding Court's reversal of the military judge's decision on behalf of the government was rarely repeated by the military appellate courts.

For example, the Court of Military Appeals upheld the Navy Court of Military Review's decision to deny writs of mandamus seeking relief from the military judge's dismissal of charges for lack of jurisdiction over an offense committed in a prior enlistment,³³⁵ and the military judge's dismissal of charges for lack of speedy trial.³³⁶ The Court of Military Appeals reversed the Navy-Marine Court of Military Review's determination that the trial judge erroneously dismissed the charges for lack of subject matter jurisdiction.³³⁷ The Army Court of Military Review likewise upheld the trial judge's exclusion of all incriminating evidence.³³⁸

In a rare exception, based on a legal theory that was of doubtful validity, the Navy-Marine Court of Military Review granted relief to the government from the ruling of the trial judge dismissing the charges for denial of speedy trial. The Navy-Marine Court of Military Review determined that the trial judge's ruling was "clearly erroneous."³³⁹ The Navy-Marine Court's legal standard of "clearly erroneous" was not endorsed by the Court of Military Appeals or other courts of military review.

The Court of Military Appeals urged Congressional action to remedy the "unhealthy" void that was caused by the great difficulty of obtaining a successful government appeal from the trial judge's decision.³⁴⁰ The Congress eventually provided the legislative action requested by the military appellate courts.

II. THE MILITARY JUSTICE ACT OF 1983

A. INTRODUCTION

In the Military Justice Act of 1983,³⁴¹ Congress authorized the government to appeal an adverse military trial court ruling. The President implemented UCMJ art. 62

with R.C.M. 908.³⁴² Service Regulations further describe the procedures for filing government appeals.³⁴³ The appeal, must be initially filed at the respective service Court of Military Review.³⁴⁴

The legislative history of UCMJ art. 62 reveals that Congress intended to allow appeals by the government from courts-martial rulings in a manner parallel to federal prosecution appeals of adverse federal district court decisions.³⁴⁵ Congress intended that UCMJ art. 62 remove all statutory and common law barriers to appeals by the United States.³⁴⁶ However, in United States v. Browers,³⁴⁷ the Court of Military Appeals commented:

Judge Wold suggests in his opinion that Article 62 should be interpreted in the same manner as 18 U.S.C. sec. 3731, on which it was modeled...18 U.S.C. sec. 3731 was not intended to produce exact parity between the government and the defendant with respect to appellate rights; and Article 62(a)(1) did not have any such objective.³⁴⁸

If the government prevails before the Court of Military Review, the accused may appeal this ruling to the Court of Military Appeals and beyond to the Supreme Court.³⁴⁹ Based on the experience of federal district courts it was expected that the use of government appeals would be rare.³⁵⁰ Frequent appeals by the government are discouraged because they interfere with trial court dockets, could potentially clog the appellate court's docket, and could disrupt military operations.³⁵¹ Statutory limitations, as well as prudential considerations, explain the small number of government appeals that have occurred since the change in the law.³⁵²

B. PREREQUISITES

1. Qualifying Proceeding.

The government may appeal only if a military judge presides over the court-martial, and trial occurs in a forum in which a punitive discharge could be adjudged.³⁵³

2. Qualifying Ruling.

The government may appeal the ruling by the trial judge which either terminates the proceedings with respect to a charge or specification,³⁵⁴ or excludes evidence,³⁵⁵ that is substantial proof of a fact material in the proceeding. A dismissal of a specification is normally required to meet the first category. Lack of jurisdiction,³⁵⁶ denial of speedy trial,³⁵⁷ failure to state an offense,³⁵⁸ unlawful command influence,³⁵⁹ and former punishment³⁶⁰ are examples of appealable dismissals by the trial judge. The trial judge's classification of the ruling is not controlling.³⁶¹ When the government appeals the trial court's suppression of evidence, the government's belief that the evidence is significant is given great weight. However, appellate courts will require a showing of substantiality and materiality of the excluded evidence before the appellate court will consider the merits of the appeal.³⁶² This limitation is not in 18 U.S.C. sec. 3731; therefore, federal precedent is not available.³⁶³

The government has argued that if the "practical effect" of the trial judge's action is to terminate the proceedings then the appellate court has jurisdiction; however, the Court of Military Appeals has rejected the effects test.³⁶⁴

C. ORDERS THAT CAN NOT BE APPEALED

The government may not appeal an order or ruling that amounts to a finding of not guilty because it is barred by double jeopardy. The Double Jeopardy Clause of the United States Constitution states, "Nor shall any person be

subject for the same offense to be twice put in jeopardy of life or limb."³⁶⁵ UCMJ art. 44 also limits the government's right to retry the accused.³⁶⁶

Denial of a request for a continuance,³⁶⁷ and an order requiring a new UCMJ art. 32 investigation³⁶⁸ are examples of orders that are not appealable despite the resulting dismissal of the charges.

D. PROCEDURE BY TRIAL PARTICIPANTS

1. Request for Continuance.

The initial step in the government appeal is for the trial counsel to request a continuance of up to 72 hours in order to decide whether to file a government appeal.³⁶⁹ This request ordinarily interrupts the trial, unless the trial judge's order is not appealable.³⁷⁰ If the trial counsel requests a delay to determine whether to file notice of appeal, the court-martial may not proceed, except as to matters unaffected by the ruling or order. The trial counsel is entitled to no more than 72 hours of delay to make the decision whether or not to appeal.³⁷¹ Failure to request delay within 72 hours of the military judge's ruling constitutes waiver of the right to a government appeal.³⁷² The trial court does not automatically lose jurisdiction to appellate courts when the trial counsel requests delay to file a UCMJ art. 62 appeal. Notice of appeal from a nonappealable order does not make acts of the trial court void for lack of jurisdiction.³⁷³ For example, in United States v. Browers,³⁷⁴ the Court of Military Appeals held that the military judge's denial of a continuance requested by the trial counsel so that the government could obtain a material witness was not appealable.³⁷⁴ The Browers Court also upheld the military judge's refusal to allow 72 hours of delay to allow the trial counsel time to consider

appealing the trial judge's decision to deny the continuance.³⁷⁵

During the 72 hour continuance requested by the trial counsel, the general court-martial convening authority or staff judge advocate must decide whether to file a notice of appeal with the trial judge.³⁷⁶

2. Reconsideration.

The trial counsel should request reconsideration of the trial judge's ruling, and should present any additional evidence and legal arguments to bolster the government's position.³⁷⁷ The convening authority may also ask the trial judge to reconsider his ruling.³⁷⁸

3. Notice.

Written notice of appeal must be filed with the trial judge within the 72 hour time limit.³⁷⁹ The notice must specify the order appealed, designate the charges and specifications affected by the order and the appeal, and certify that the government is not appealing to delay the proceedings.³⁸⁰ If the ruling being appealed excludes evidence, the notice must certify that the excluded evidence is substantial proof of a material fact in the proceeding.³⁸¹

4. Stay of Proceedings.

Notice of appeal by the government stays the trial proceedings except as to unaffected charges and specifications.³⁸² The trial judge may order litigation of other motions. If trial on the merits has not started, the trial judge may order severance of unaffected charges and trial may proceed.³⁸³

5. Record of Trial.

The trial counsel must insure that a verbatim record of the proceedings is prepared to the extent necessary to resolve the issue that the government is appealing. The military judge or the appellate court may order production of additional portions of the record. The trial counsel must insure that the record is appropriately authenticated, and classified.³⁸⁴

6. Forwarding the Appeal.

The trial counsel must promptly forward the appeal to the Chief, Government Appellate Division, United States Army Legal Services Agency.³⁸⁵ The trial counsel must include a verbatim record of trial. If the verbatim record is not ready, then the trial counsel should mail a summary of the evidence, a copy of the notice of appeal filed with the trial judge, and a statement of the issues.³⁸⁶ These materials must reach the Chief, Government Appellate Division, within 20 days from the date written notice of appeal is filed with the trial court.³⁸⁷

E. DECISION TO FILE THE APPEAL

The Chief, Government Appellate Division, after coordination with the Assistant Judge Advocate General for Military Law, decides whether the government appeal should be filed with the Army Court of Military Review.³⁸⁸ If the Chief, Government Appellate Division, decides not to appeal, he must immediately inform the trial counsel, defense counsel and trial judge of his decision.³⁸⁹

F. PROCEDURE AT APPELLATE LEVEL

Initially the case is filed at the Court of Military Review,³⁹⁰ and the parties are represented by detailed military appellate counsel.³⁹¹ Government counsel are

ordered to prosecute the appeal "diligently"³⁹² and the appellate tribunal gives the case priority.³⁹³ Appellate courts must accept the trial judge's findings of fact unless they are "clearly erroneous."³⁹⁴ Military appellate courts are limited under UCMJ art. 62 to review "matters of law."³⁹⁵ In addition to the "clearly erroneous" and the "matters of law" standards, military appellate courts have articulated other standards, such as findings of fact by the military judge may not be disturbed unless the findings "are wholly unsupported by the evidence,"³⁹⁶ if the trial judge abuses his discretion.³⁹⁷ The standard of review in the federal civilian system is that a trial judge's finding of fact "may be overturned only if clearly erroneous."³⁹⁸

If the government loses at the Court of Military Review, the Judge Advocate General may certify the case to the Court of Military Appeals for review.³⁹⁹ If the accused loses at the Court of Military Review, military appellate defense counsel must advise the accused that he may petition the Court of Military Appeals for review.⁴⁰⁰ The trial may proceed after the decision by the Court of Military Review unless the Court of Military Appeals or the Supreme Court issues a stay order.⁴⁰¹

III. SUBSTANTIVE AREAS

A. JURISDICTION

1. Subject Matter.

The Court of Military Appeals has held that a de novo ad hoc judgement by the military appellate courts on the issue of service connection is appropriate.⁴⁰²

The military and civilian appellate courts have consistently reversed any trial judge's ruling that the military court lacked subject matter jurisdiction over any crime by a person on active duty.⁴⁰³

2. Personal.

Government appeal regarding personal jurisdiction, rather than subject matter jurisdiction, will dominate jurisdictional litigation over the next several years. For example, in United States v. Howard,⁴⁰⁴ the Court of Military Appeals reversed the Army Court of Military Review's decision, and reinstated the trial judge's dismissal of the charges for lack of in personam jurisdiction. The Howard Court indicated that court-martial jurisdiction is lost upon delivery of the discharge certificate, absent fraud,⁴⁰⁵ discharge for the sole purpose of reenlistment,⁴⁰⁶ or some saving statutory authorization.⁴⁰⁷

The issue of loss of court-martial jurisdiction when the accused reenlists will continue to remain an important issue for appellate courts to resolve by government appeal.⁴⁰⁸

B. SPEEDY TRIAL

Considerable appellate litigation has occurred regarding interpretations of the new speedy trial rules, R.C.M. 304 and 707. Government appeals have greatly contributed to resolving ambiguities in R.C.M. 304 and 707.⁴⁰⁹

For example in United States v. Jones,⁴¹⁰ the Navy-Marine Court of Military Review ruled that the government was not required to demonstrate that it would have proceeded to trial with the 120 day period "but for" the prosecution's accountability exemptions in R.C.M. 707(c).

In United States v. Harvey,⁴¹¹ the Court of Military Appeals reinstated the trial judge's dismissal of the charges because the accused was denied his right to speedy trial. The government's failure to begin the accused's trial until the 79th day after the initiation of pretrial

confinement, and a request for trial without delay were considered important. In Harvey, the Navy-Marine Court of Military Review erroneously decided that R.C.M. 707 replaced the previous speedy trial rules. The Harvey Court indicated that the previous speedy trial rules coexist with the new rules. Based on government appeals, military appellate courts have also determined that delay of the court-martial to process a resignation is government delay for speedy trial purposes.⁴¹² However, delay for a mental evaluation of the accused at the command's request is defense delay.⁴¹³ Voluntary absence of a sailor awaiting trial and his return to his assigned ship is defense delay.⁴¹⁴

In United States v. Bradford,⁴¹⁵ the Court of Military Appeals reversed the military judge's determination that placement of a suspect on restriction under the "liberty risk program" was a condition on liberty triggering speedy trial considerations. The Bradford Court found that requiring a suspect to obtain permission prior to leaving base was not a condition on liberty triggering speedy trial considerations.⁴¹⁶

Military appellate courts also reversed the trial court's ruling that R.C.M. 707 should be retroactively applied.⁴¹⁷

C. AMENDMENT OF CHARGES/STATUTE OF LIMITATIONS

The Navy-Marine Court of Military Review reversed the trial judge's determination that amendment of the charge sheet to reallege desertion⁴¹⁸ vice unauthorized absence constituted a major change under R.C.M. 603.⁴¹⁹ The trial judge's ruling had caused dismissal of charges due to violation of the statute of limitations.

D. DEFECTIVE PRETRIAL ADVICE

The government successfully appealed the dismissal of the a specification due to defective pretrial advice. In United States v. Harrison,⁴²⁰ the Navy-Marine Court of Military Review reversed the trial judge's dismissal of a specification because the Staff Judge Advocate's advice under UCMJ art. 34 failed to clearly indicate whether or not the specification stated an offense. The Harrison Court indicated that a continuance rather than dismissal was the appropriate remedy to correct the deficient pretrial advice.

E. EVIDENTIARY ISSUES

1. Urinalysis tests.

In 1985, The Army Court of Military Review in United States v. Austin,⁴²¹ upheld the military judge's refusal to admit results of urinalysis tests because the urine sample was taken primarily for disciplinary purposes. Two years later in United States v. Rodriguez,⁴²² the Army Court of Military Review limited this ruling by reversing the military judge's refusal to admit the results of urinalysis tests. The Rodriguez Court stated that a predetermined notion that disciplinary action would be taken by the commander that authorized the seizure of the urine for soldiers that had the marijuana metabolite in their urine did not automatically change the inspection to a search. Contemplation of disciplinary procedures by the commander ordering urinalysis testing did not automatically convert the examination into a search unless this was his only purpose in ordering the seizure of the urine.

The Navy-Marine Court of Military Review also reversed the military judge's exclusion of urinalysis test results because the government failed to comply with

regulations regarding type and locations for testing.⁴²³

2. Hearsay/Mil. R. Evid. 803(24) and 804(b)(5).

In United States v. Mayer,⁴²⁴ The Air Force Court of Military Review held that the trial judge correctly determined that the statements of the victim were not admissible because they lacked "equivalent circumstantial guarantees of trustworthiness" under the Military Rules of Evidence.

3. Uncharged Misconduct/Mil. R. Evid. 403 and 404.

The Air Force Court of Military Review held that trial judge did not abuse his discretion when he ruled that evidence of other misconduct by the accused was not admissible. The relevance of the evidence (to show intent of the accused to commit the charged offense) was substantially outweighed by its unfair prejudicial tendencies.⁴²⁵

On the other hand, the Navy-Marine Court of Military Review in United States v. Petersen,⁴²⁶ held that the trial judge erroneously applied Mil. R. Evid. 403 and 404 when he ruled that evidence of two uncharged sexual offenses was not admissible.

4. Jencks Act.⁴²⁷

In two recent cases the Navy-Marine Court of Military Review reversed the trial judge's suppression of the testimony of witnesses based on the government's failure to comply with the Jencks Act. In United States v. Derrick,⁴²⁸ the Navy-Marine Court found that the record failed to establish prejudice to the accused caused by loss of the statement. In United States v. Olander,⁴²⁹ the Navy-Marine Court held that the existence of the missing statement was not established, and there was no evidence that the government actions constituted bad faith.

5. Confession/Mil. R. Evid. 304.

In United States v. Yates,⁴³⁰ the Court of Military Appeals reversed the trial judge's decision to suppress the confession of the accused because of lack of corroboration. In United States v. St Clair,⁴³¹ the trial judge ordered the accused's confession suppressed because of the police promise to get the accused "off restriction." The trial judge ruled that this promise constituted an improper inducement. The Navy-Marine Court of Military Review held that this promise was an inducement; however, the St Clair Court held that this promise was not unlawful. The St Clair Court admitted the confession.

6. Failure to Comply with Regulations.

In United States v. Hilbert,⁴³² the Navy-Marine Court of Military Review reversed the military judge's exclusion of the urinalysis test results because the government failed to comply with regulations regarding type of urine test and locations for testing the urine. In United States v. Morris,⁴³³ the Court of Military Appeals reversed the trial judge's exclusion of the accused's Human Immunodeficiency Virus [hereinafter cited as HIV] test. The trial judge had erroneously determined that results of HIV testing were not admissible based upon an Army policy letter.

7. Failure to Show Evidence Not Derived From Immunized Testimony.

In United States v. Tucker,⁴³⁴ the Navy-Marine Court of Military Review upheld the military judge's dismissal of the charges because the government failed to meet its heavy burden of demonstrating that no derivative use had been made of the accused's immunized testimony in his court-martial.

IV. FEDERAL COURTS

Broad construction has been given to the government's right to appeal from interlocutory orders suppressing or excluding evidence. For example, if the government alleges that the evidence suppressed by the trial court was "substantial" the appellate court will have jurisdiction.⁴³⁵ The Federal Courts of Appeals have shown little reluctance to grant relief to the government in criminal cases.⁴³⁶ This treatment is similar to military appellate treatment of government appeals.

V. CONCLUSION

Government appeals provide the only avenue to reverse an erroneous ruling by the trial judge. Decisions in areas that have traditionally been in the sole discretion of the trial judge, remain the only barrier to a successful government appeal. For example, the military appellate courts will not disturb the trial judge's decision regarding the time of trial.⁴³⁷

Military appellate courts have considered government appeals in almost every substantive area of the law. Military appellate courts have overcome the barrier of being limited to reviewing legal, rather than factual matters, by determining that factual matters can be overturned if "clearly erroneous." If the government can argue any theory of admissibility or reason not to dismiss a specification, then the government has a significant opportunity to obtain appellate reversal of the trial judge's decision.

In 1987, the Supreme Court's action in United States v. Solorio,⁴³⁸ provided the best possible assurance that government appeals are proper. The Supreme Court's endorsement of government appeals in Solorio eliminated

any lingering doubts as to the legality of UCMJ art. 62 appeals. The Solorio Court's elimination of the confusion that plagued military practitioners regarding the limits of subject matter jurisdiction is a powerful illustration of the value of government appeals to clarify the law.

1. Virginia v. Rives, 100 U.S. 313, 323, (1880), quoted in Dettinger v. United States, 7 M.J. 216, 218 (C.M.A. 1979).
2. See Noyd v. Bond, 395 U.S. 683, 685 n.7 (1969); United States v. Snyder, 18 C.M.A. 480, 40 C.M.R. 192 (1969), limited by McPhail v. United States, 1 M.J. 457, 462 (C.M.A. 1976).
3. See Parisi v. Davidson, 405 U.S. 34, 44 (1969); United States v. Augenblick, 393 U.S. 348, 350 (1969); Dettinger v. United States, 7 M.J. 216, 218 (C.M.A. 1979); Wacker, The "Unreviewable" Court-Martial Conviction: Supervisory Relief Under the All Writs Act From The United States Court of Military Appeals, 10 Harv. Civ. Rights-Civ. Lib. L. Rev. 33, 56 (1975).
4. See Index and Legislative History, UCMJ (1950). See also Cox, The Army, The Courts, And The Constitution: The Evolution of Military Justice, 118 Mil. L. Rev. 1, 14 (1987).
5. See Cox, supra note 4, at 14.
6. UCMJ art. 67(b). See H. Nufer, American Servicemember's Supreme Court (1981); Cox, supra note 4, at 15.
7. See Rankin, The All Writs Act and the Military Judicial System, 53 Mil. L. Rev. 103, 104 (1971).
8. Id. at 105.
9. Id.
10. See, e.g., United States v. Frischholz, 16 C.M.A. 150, 36 C.M.R. 306 (1966).
11. See, e.g., Levy v. Resor, 17 C.M.A. 135, 37 C.M.R. 399 (1967).
12. Id.
13. See, e.g., Gale v. United States, 17 C.M.A. 40, 37 C.M.R. 304 (1967).
14. See Rankin, supra note 7, at 105.
15. See Denver-Greeley Valley Irr. Dist. v. McNeil, 106 F.2d 288 (9th Cir. 1939). See also Rankin, supra note 7, at 105.

16. See *Harrison v. United States*, 20 M.J. 55, 57 (C.M.A. 1985), quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). In *Harrison* the Court of Military Appeals decided that the military judge, on reconsideration requested by the convening authority, could appropriately consider additional evidence regarding the speedy trial issue. The defense requested writ of mandamus to compel the military judge to reinstate his initial dismissal of the charges for lack of speedy trial was denied. The *Harrison* Court declined to consider the issue of whether the accused had been denied his right to speedy trial. *Id.* at 58 n.4.
17. *Smithee v. Vorbach*, 25 M.J. 561, 562 (C.G.C.M.R. 1987); *United States v. Mahoney*, 24 M.J. 911, 914 (A.F.C.M.R. 1987). See also *Rankin*, supra note 7, at 106.
18. *United States v. ex rel. McEnnan v. Wilbur*, 283 U.S. 414 (1930). See also *Rankin*, supra note 7, at 106.
19. *Ex parte Newman*, 81 U.S. 152 (1872). See also *Rankin*, supra note 7, at 106.
20. See *United States ex rel. Stovall v. Deming*, 19 F.2d 697 (D.C. Cir. 1927). See also *Rankin*, supra note 7, at 106.
21. See *Harrison v. United States*, 20 M.J. 55, 57 (C.M.A. 1985); *United States v. LaBella*, 15 M.J. 228, 229 (C.M.A. 1983).
22. *Smithee v. Vorbach*, 25 M.J. 561, 562 (C.G.C.M.R. 1987) (writ of mandamus to direct the Chief Counsel of the Coast Guard to review a special court-martial under UCMJ art. 69 denied); *United States v. Mahoney*, 24 M.J. 911, 914 (A.F.C.M.R. 1987) (writ of mandamus denied).
23. *Smithee v. Vorbach*, 25 M.J. 561, 562 (C.G.C.M.R. 1987); *United States v. Mahoney*, 24 M.J. 911, 914 (A.F.C.M.R. 1987).
24. *United States v. Dooling*, 406 F.2d 192 (2nd Cir. 1969). See also *Rankin*, supra note 7, at 106.
25. *Bartsch v. Clark*, 293 F.2d 283 (4th Cir. 1961). See also *Rankin*, supra note 7, at 106.

26. 12 M.J. 335 (C.M.A. 1982). In Cooke, the staff judge advocate made an agreement with the accused not to prosecute if the accused described the information he provided to the Soviets, and passed a polygraph examination. The accused met these requirements; however, the government attempted to prosecute. The Court of Military Appeals refused to allow military prosecution of Cooke.
27. 10 M.J. 649 (N.C.M.R. 1980).
28. See Petition of the United States, 263 U.S. 289 (1923). See also Rankin, supra note 7, at 106.
29. See Leimer v. Reeves, 184 F.2d 441 (8th Cir. 1950). See also Rankin, supra note 7, at 106.
30. Ex parte Fassett, 142 U.S. 479 (1892). See also Rankin, supra note 7, at 106.
31. 20 C.M.A. 438, 43 C.M.R. 278 (1971). But see, e.g., Robertson v. Wetherill, 21 C.M.A. 77, 44 C.M.R. 131 (1971) (writ of prohibition denied); Moye v. Fawcett, 10 M.J. 838 (N.C.M.R. 1981) (writ of prohibition denied).
32. 19 C.M.A. 630 (1969), cited with approval in United States v. Redding, 11 M.J. 100, 104 (C.M.A. 1981).
33. See Carbo v. United States, 364 U.S. 611 (1961). See also Rankin, supra note 7, at 108.
34. Noyd v. Bond, 395 U.S. 683, 695 n.7 (1969); Pavlick, Extraordinary Writs in the Military Justice System: A Different Perspective, 84 Mil. L. Rev. 7, 35 (1979).
35. Ex parte Tom Tong, 108 U.S. 556 (1883). See also Rankin, supra note 7, at 108.
36. Smith v. Bennett, 365 U.S. 708 (1961). See also Rankin, supra note 7, at 108.
37. See Rankin, supra note 7, at 108.
38. See Price v. Johnson, 334 U.S. 266 (1948). See also Rankin, supra note 7, at 109.
39. See Rankin, supra note 7, at 109.
40. Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807); Pavlick, supra note 34, at 36.

41. See Pavlick, supra note 34, at 35.
42. See Robison v. Abbott, 23 C.M.A. 219, 49 C.M.R. 8 (1974). See also Pavlick, supra note 34, at 35.
43. 28 U.S.C. sec. 1651(a) (1982). See also Pavlick, supra note 34, at 35.
44. See United States v. Haymen, 342 U.S. 205 (1952); Price v. Johnson, 334 U.S. 266 (1948); Pavlick, supra note 34, at 35.
45. See, e.g., Collier v. United States, 19 C.M.A. 511, 42 C.M.R. 113 (1970); Pavlick, supra, note 34, at 35.
46. See UCMJ art. 13; Gerstein v. Pugh, 420 U.S. 103 (1975), cited with approval in Berta v. United States, 9 M.J. 390, 391 (C.M.A. 1980). In Berta v. United States, 9 M.J. 390 (C.M.A. 1980) the military judge denied the accused's request for release from pretrial confinement because the accused might not appear for his own trial, since he may be in danger from other as yet unidentified Marines. Id. at 391. Without applying to the Court of Military Review for relief, the accused appealed directly to the Court of Military Appeals for release. The Court of Military Appeals, after conducting a hearing, ordered Lance Corporal Berta's release from confinement. See also Fletcher v. Commanding Officer, 2 M.J. 234 (C.M.A. 1977) (Court of Military Appeals orders release of 8 Marines from pretrial confinement after holding a hearing. Cases appealed directly from the military judge to the Court of Military Appeals based upon "applications for relief in the nature of writs of habeas corpus pursuant to 28 U.S.C. sec. 1651."); United States v. Heard, 3 M.J. 14 (C.M.A. 1977).
47. 13 M.J. 990 (N.M.C.M.R. 1982).
48. 19 C.M.A. 511, 42 C.M.R. 113 (1970).
49. UCMJ art. 57(d). See also Pavlick, supra note 34, at 19.
50. Habeas corpus ad subjucendum, 28 U.S.C. 2241.
51. 19 C.M.A. 511, 517, 42 C.M.R. 113, 119 (1970). See also Pavlick, supra note 34, at 19.

52. 23 M.J. 29 (C.M.A. 1986).

53. 23 M.J. 755 (A.C.M.R. 1986). See also Johnson v. United States, 19 C.M.A. 407, 42 C.M.R. 9 (1970) (petitioner could not be confined as a sentenced prisoner after his petition for new trial had been granted).

54. 20 M.J. 699 (A.C.M.R.), writ appeal denied, 20 M.J. 196 (C.M.A. 1985) (no habeas corpus relief received because restriction not tantamount to pretrial confinement). See generally, e.g., Jones v. Ignatius, 18 C.M.A. 7, 39 C.M.R. 7 (1968) (convening authority's action commuting bad-conduct discharge to five months confinement, increasing confinement to eleven months set aside).

55. 10 M.J. 649 (N.C.M.R. 1980).

56. See, e.g., Woodrick v. Divich, 24 M.J. 147 (C.M.A. 1987); Herrod v. Widdecke, 19 C.M.A. 574, 42 C.M.R. (1970); In re Guadalupe, 18 C.M.A. 649 (1969) (review of request for a hardship discharge not in aid of jurisdiction); Mueller v. Brown, 18 C.M.A. 534, 40 C.M.R. 246 (1969) (Court of Military Appeals will not review a denial of conscientious objector discharge); In re Taylor, 12 C.M.A. 437, 31 C.M.R. 13 (1961); United States v. Plummer, 12 C.M.A. 18, 30 C.M.R. 18 (1960). In Cooke v. Orser, 12 M.J. 335, 346 n.39 (C.M.A. 1982) (Fletcher, C.J., lead opinion) the Chief Judge Fletcher stated, "This Court has no jurisdiction over the administrative discharge system of the armed services."

57. See, e.g., United States v. Frischolz, 16 C.M.A. 150, 36 C.M.R. 306 (1966); Del Prado v. United States, 23 C.M.A. 132, 48 C.M.R. 748 (1974); Chapel v. United States, 21 M.J. 687, 689 (A.C.M.R. 1985); United States v. Montcalm, 2 M.J. 787, 791 (A.C.M.R. 1976).

58. In McPhail v. United States, 1 M.J. 457, 459 (C.M.A. 1976), the Court of Military Appeals initially denied a writ of prohibition to stop the convening authority's expected action. Initial intervention by the Court of Military Appeals was premature because the convening

authority had not acted. After the convening authority acted the Court of Military Appeals could not consider the case as a writ under coram nobis because there had been no error by the court.

59. An error which would justify relief during normal appellate review will not necessarily trigger coram nobis relief. See United States v. Morgan, 346 U.S. 502, 505-513 (1954); United States v. Gross, 614 F.2d 365, 368 (3d Cir.), cert. denied, 447 U.S. 925 (1980); Chapel v. United States, 21 M.J. 687, 689 (A.C.M.R. 1985).

60. United States v. Morgan, 346 U.S. 502, 512 (1954); Chapel v. United States, 21 M.J. 687, 689 (A.C.M.R. 1985) (accused raised issue of unlawful command influence as error coram nobis, but failed to meet burden).

61. See, e.g., Fleiner v. Koch, 19 C.M.A. 630 (1969); Zamora v. Woodson, 19 C.M.A. 403, 42 C.M.R. 5 (1970).

62. See, e.g., Coleman v. United States, 21 C.M.A. 171, 44 C.M.R. 225 (1972); Lohr v. United States, 21 C.M.A. 150, 44 C.M.R. 204 (1972).

63. See, e.g., United States v. Jackson, 17 C.M.A. 681 (1968) (remanded for rehearing on issues of mental responsibility and capacity because issues not raised at trial).

64. Belichsky v. Bowman, 21 C.M.A. 146, 44 C.M.R. 200 (1972); Brooks v. United States, 2 M.J. 1257, 1260-1261 (A.C.M.R. 1976).

65. United States v. Schmeltz, 1 M.J. 8 (C.M.A. 1975); United States v. Montcalm, 2 M.J. 787, 792 (A.C.M.R. 1976).

66. See Hendrix v. Warden, 23 C.M.A. 227, 49 C.M.R. 146 (1974); Del Prado v. United States, 23 C.M.A. 132, 48 C.M.R. 748 (1974); Asher v. United States, 22 C.M.A. 6, 46 C.M.R. 6 (1972); Belichsky v. Bowman, 21 C.M.A. 146, 44 C.M.R. 200 (1972); United States v. Frischolz, 16 C.M.A. 150, 36 C.M.R. 306 (1966); United States v. Montcalm, 2 M.J. 787, 793 (A.C.M.R. 1976) (petitioner applied for retroactive application of United States v. Holland, 1 M.J.

58 (C.M.A. 1975)); United States v. Foxworth, 2 M.J. 508, 509 (A.C.M.R. 1976). See also Pavlick, supra note 34, 17. 67. Belichesky v. Bowman, 21 C.M.A. 146, 44 C.M.R. 200 (1972); Mercer v. Dillon, 19 C.M.A. 264, 41 C.M.R. 264 (1970); Brooks v. United States, 2 M.J. 1257, 1260 (A.C.M.R. 1976).

68. Del Prado v. United States, 23 C.M.A. 132, 48 C.M.R. 748 (1974); Gallagher v. United States, 22 C.M.A. 191, 46 C.M.R. 191 (1973); United States v. Brooks, 2 M.J. 1257, 1261 (A.C.M.R. 1976).

69. Chapel v. United States, 21 M.J. 687, 689 (A.C.M.R. 1985) (accused met burden of showing issue of unlawful command influence, unknown at trial and during appeal; however, coram nobis denied because accused not affected by unlawful command influence).

70. The Court of Military Appeals in Hendrix v. Warden, 23 C.M.A. 227, 228, 49 C.M.R. 146, 147 (1974) commented that finalization of proceedings under UCMJ art 76 not only terminates the appellate process of courts-martial, it also terminates the court's jurisdiction of the case, except in circumstances contemplated by 28 U.S.C. sec. 1651(a). Later in 1974 the Court of Military Appeals stated:

The writ of error coram nobis is a procedure, available under 28 U.S.C. 1651(a) which permits a court to remedy errors not perceived or not fully assessed when the case was first before it. Both at common law and in modern practice, the relief afforded thereby is without limitation of time for facts affecting the validity and regularity of the judgment...Nor is the possibility for relief terminated by the exhaustion of all appellate rights and procedures established by the Uniform Code of Military Justice...Even the termination of the individual's amenity to the court-martial processes does not necessarily terminate the power of this Court to grant relief.

Del Prado v. United States, 23 C.M.A. 132, 133, 48 C.M.R. 748, 749 (1974). See also, Brooks v. United States, 2 M.J. 1257, 1261 (A.C.M.R. 1976).

71. United States v. Elliott, 3 F.2d 496 (W.D. Wash. 1924), aff'd, 5 F.2d 292 (9th Cir. 1925). See also Rankin, supra note 7, at 107.

72. Id.

73. House v. Mayo, 324 U.S. 42 (1945). See also Rankin, supra note 7, at 107.

74. In re Chetwood, 176 U.S. 443 (1897). See also Rankin, supra note 7, at 107. The Rules of Practice and Procedure for the Court of Military Appeals do not mention the possibility of writs of certiorari. See Rule 4(b) Court of Military Appeals Rules of Practice and Procedure, 15 M.J. CXIX (July 1, 1983).

75. Angelus v. Sullivan, 246 F. 54 (2d Cir. 1917). See also Rankin, supra note 7, at 107.

76. See Rankin, supra note 7, at 107.

77. Id.

78. Id. at 109.

79. Id.

80. See Abel v. Tinsley, 335 F.2d 514 (10th Cir. 1964); McDonald v. United States, 356 F.2d 980 (10th Cir. 1966). See also, Rankin, supra note 7, at 109.

81. See Goto v. Lane, 265 U.S. 395, 401 (1924). See also Rankin, supra note 7, at 109.

82. Ex parte Tom Tong, 108 U.S. 556 (1883). See also Rankin, supra note 7, at 109.

83. Id.

84. See Rankin, supra note 7, at 109.

85. Id.

86. See, e.g., Chickaming v. Carpenter, 106 U.S. 663 (1883) (mandamus); U.S. Alkali Export Assn. v. United States, 325 U.S. 196 (1945) (prohibition); Holiday v. Johnson, 313 U.S. 342 (1941) (certiorari); United States v. Morgan, 346 U.S. 502 (1954) (coram nobis); Price v. Johnston, 334 U.S. 266

- (1948) (habeas corpus). See also Rankin, supra note 7, at 110.
87. 1 Stat. 81.
88. The development of these two lines of authority is traced in Carbo v. United States, 364 U.S. 611 (1961). See also Rankin, supra note 7, at 110 n.70.
89. Carbo v. United States, 364 U.S. 611 (1961). See also Rankin, supra note 7, at 111.
90. 28 U.S.C. sec. 1651(a) (1982).
91. United States v. Frischolz, 16 C.M.A. 150, 36 C.M.R. 306 (1966). See also Cox, supra note 4, at 15.
92. Edgerly v. Kennelly, 215 F.2d 420 (7th Cir. 1954), cert. denied, 348 U.S. 938 (1955).
93. See Benson v. State Board of Parole and Probation, 384 F.2d 238 (9th Cir. 1968), cert. denied, 391 U.S. 954 (1968).
94. Cf., e.g., Price v. Johnson, 334 U.S. 266 (1948); U.S. Alkali Export Assn. v. United States, 325 U.S. 196 (1945). See Rankin, supra note 7, at 111.
95. Cf., e.g., Ex parte Peru, 318 U.S. 578 (1943).
96. In re Previn, 204 F.2d 419 (1st Cir. 1953) provides a detailed discussion of the distinction between actual and potential appellate jurisdiction, and illustrative citations.
97. See Rankin, supra note 7, at 112.
98. See, e.g., Roche v. Evaporated Milk Assn., 319 U.S. 21 (1953).
99. See, e.g., LaBuy v. Howes Leather Co., 352 U.S. 249 (1957).
100. See, e.g., United States v. Dooling, 406 F.2d 192 (2d Cir. 1969).
101. See, e.g., In re Josephson, 218 F.2d 174 (1st Cir. 1954).
102. See Rankin, supra note 7, at 112.

103. U.S. Alkali Export Assn. v. United States, 325 U.S. 196 (1945). See also Wolfson, Extraordinary Writs in the Supreme Court Since Ex Parte Peru, 51 Colum. L. Rev. 977 (1951). -
104. United States v. Morgan, 346 U.S. 502 (1954).
105. United States v. Carbo, 364 U.S. 611, 614-615 (1961). See also Rankin, supra note 7, at 114.
106. See Pavlick, supra note 7, at 13.
107. UCMJ art. 67. See also Pavlick, supra note 7, at 13.
108. See Pavlick, supra note 7, at 13.
109. See United States v. Morgan, 346 U.S. 502 (1954); Banker's Life and Casualty Co. v. Holland, 346 U.S. 379 (1953); Pavlick, supra note 7, at 13.
110. See Pavlick, supra note 7, at 14; H. Moyer, Justice and the Military, at 642 (1972).
111. 4 C.M.A. 581, 585, 16 C.M.R. 155, 159 (1954) (Quinn, J.). See also, Dettinger v. United States, 7 M.J. 216 (C.M.A. 1979); United States v. Ferguson, 5 C.M.A. 68, 86-87, 17 C.M.R. 68, 86-87 (1954) (Brosman, J.); Moyer, supra note 110, at 642. Pavlick, supra note 7, at 14.
112. 346 U.S. 502 (1954). In Jones v. Commander, 18 M.J. 198, 201 (C.M.A. 1984) (Everett, C.J., dissenting), Chief Judge Everett stated that not until 1954-in the seminal case of United States v. Morgan, 346 U.S. 502 (1954)-did the Supreme Court reveal the potential scope of the All Writs Act, 28 U.S.C. sec. 1651, in criminal cases.
113. See United States v. Ferguson, 5 C.M.A. 68, 17 C.M.R. 68 (1954). See also In re Taylor, 12 C.M.A. 427, 31 C.M.R. 13 (1961) (relief denied from decision of the Judge Advocate General to decertify the petitioner as trial judge because the subject matter of the petition was administrative and therefore not in aid of jurisdiction); United States v. Taveras, 10 C.M.A. 282, 27 C.M.R. 356 (1959) (Court of Military Appeals has jurisdiction to entertain coram nobis writ but declines in particular case); United States v. Buck, 9 C.M.A. 290, 26 C.M.R. 70

- (1958) (Court of Military Appeals assumes it has the power to grant extraordinary relief, but declines in the particular case); Pavlick, supra note 34, at 14; Rankin, supra note 7, at 115; Moyer, supra note 110, at 642.
114. 16 C.M.A. 150, 36 C.M.R. 306 (1966).
115. United States v. Frischholz, 16 C.M.A. 150, 152, 36 C.M.R. 306, 308 (1966) (writ of error coram nobis used to attack conviction finalized five years earlier), cited with approval in United States v. Matthews, 16 M.J. 354, 367 (C.M.A. 1983); Jones v. Commander, 18 M.J. 198, 201 (C.M.A. 1984) (Everett, C.J., dissenting). See also Pavlick, supra note 34, at 14; Moyer, supra note 110, at 643.
116. See Hallinan v. Lamont, 18 C.M.A. 652 (1968); Levy v. Resor, 17 C.M.A. 135, 37 C.M.R. 399 (1967); Gale v. United States, 17 C.M.A. 40, 37 C.M.R. 304 (1967); Pavlick, supra note 7, at 14; Moyer, supra note 110, at 643.
117. Jones v. Ignatius, 18 C.M.A. 7, 39 C.M.R. 7 (1968) (habeas corpus or other appropriate relief granted).
118. See e.g., Fleiner v. Koch, 19 C.M.A. 630 (1969); United States v. Jackson, 17 C.M.A. 681 (1968); Pavlick, supra note 34, at 14; Moyer, supra note 110, at 643.
119. 18 C.M.A. 10, 39 C.M.R. 10 (1969).
120. United States v. Bevilacqua, 18 C.M.A. 10, 11-12, 39 C.M.R. 10, 11-12 (1969).
121. Under UCMJ art. 67(b), the Court of Military Appeals can only review cases reviewed by a Court of Military Review. UCMJ art. 66(b) limits review by the Court of Military Review to cases:
- (o)f trial by court-martial-
 - (1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).__

An additional category of cases that the Court of Military Appeals has the power to review includes any case previously reviewed by the Court of Military Appeals. The Court of Military Appeals may rereview the case without the necessity of the case passing through the Court of Military Review. The court's objective is to insure that its orders are carried out properly regardless of the sentence approved or other action that is taken on a case. See United States v. Bullington, 13 M.J. 184, 185 (C.M.A. 1982); United States v. Hawkins, 11 M.J. 4, 6 (C.M.A. 1981). See also Pavlick, supra note 34, at 10 n.9.

122. See Pavlick, supra note 34, at 15.

123. 18 C.M.A. 480, 40 C.M.R. 192 (1969).

124. See United States v. Snyder, 18 C.M.A. 480, 40 C.M.R. 192 (1969). See also Pavlick, supra note 34, at 15-16.

125. See Rankin, supra note 7, at 120.

126. 393 U.S. 348 (1969). See Pavlick, supra note 34, at 16.

127. United States v. Augenblick, 393 U.S. 348 (1969).

128. 395 U.S. 683 (1969).

129. 395 U.S. 683, 685 n.7 (1969).

130. In Noyd v. Bond, 395 U.S. 683, 685 n.7 (1969) the Court stated:

(W)e do not believe that there can be any doubt as to the power of the Court of Military Appeals to issue an emergency writ of habeas corpus in cases, like the present one, which may ultimately be reviewed by that court. A different question would, of course, arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes. Cf. United States v. Belivacqua, 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968).

See also Pavlick, supra note 34, at 16.

131. 405 U.S. 34 (1972).

132. Parisi v. Davidson, 405 U.S. 34, 44 (1972). See also Dettinger v. United States, 7 M.J. 216, 218 (C.M.A. 1979).

133. See Pavlick, supra note 34, at 24-25.

134. First Judiciary Act, ch. 20, sec. 13, 1 Stat. 80 (1789), which became sec. 234 of the Judicial Code of 1911, ch. 231, sec. 234, 36 Stat. 1156. See Pavlick, supra note 34, at 24-25.

135. First Judiciary Act, ch. 20, sec. 14, 1 Stat. 81 (1789), which became sec. 262 of the Judicial Code of 1911, ch. 231, sec. 262, 35 Stat. 1162. See Pavlick, supra note 34, at 25.

136. See Ex parte Bradley, 74 U.S. (7 Wall.) 364 (1868). See also Pavlick, supra note 34, at 25.

137. 1 M.J. 457 (C.M.A. 1976).

138. McPhail v. United States, 1 M.J. 457, 460-461 (C.M.A. 1976). In McPhail the Court of Military Appeals explained the basis for the supervisory power by comparing itself to the Supreme Court. The Supreme Court initiated the supervisory power in Ex Parte Bradford, 74 U.S. (7 Wall.) 364 (1869). In Ex Parte Bradford the petitioner was disbarred by the Supreme Court of the District of Columbia. He applied directly to the Supreme Court for a writ of mandamus, alleging that the court which had disbarred him lacked jurisdiction. The Supreme Court acknowledged that the disbarment judgement was not within its appellate jurisdiction, nonetheless the Court reviewed the judgement in exercise of its authority "in the supervision of the proceedings of inferior courts, in cases in which there is a legal right, without any existing legal remedy." Id. at 376. The supervisory function has traditionally been exercised by the Supreme Court "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." Roche v. Evaporated Milk Assn., 319 U.S. 21, 26 (1943), reaffirmed in Kerr v. United States

District Court, 426 U.S. 394 (1976). The Court of Military Appeals has relied upon the Supreme Court's comment, "[T]he Court to which Congress has confined primary responsibility for the supervision of military justice in this country and abroad is the Court of Military Appeals." See *McPhail v. United States*, 1 M.J. 457, 462 (C.M.A. 1976).

139. *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953). See also *United States v. DiBello*, 17 M.J. 77 (C.M.A. 1983); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); *Jones v. Commander*, 18 M.J. 198, 202 (C.M.A. 1984) (Everett, C.J., dissenting) (Chief Judge Everett felt that utilization of nonjudicial punishment was "usurpation of power" by the Commander triggering mandamus jurisdiction by the Court of Military Appeals); Pavlick, supra note 34, at 26.

140. See *Will v. United States*, 389 U.S. 90, 104 (1967). See also Pavlick, supra note 34, at 26.

141. See *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953). See also Pavlick, supra note 34, at 26.

142. See *Will v. United States*, 389 U.S. 90, 104 n.14 (1967). See also Pavlick, supra note 34, at 26.

143. *Murray v. Haldeman*, 16 M.J. 74, 67 (C.M.A. 1983).

144. See, e.g., *Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981).

145. See, e.g., *Solorio v. United States*, 107 S.Ct. 2924 (1987); *Murray v. Haldeman*, 16 M.J. 74, 77 (C.M.A. 1983).

146. See *Murray v. Haldeman*, 16 M.J. 74, 76 (C.M.A. 1983); *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982).

147. See *Murray v. Haldeman*, 16 M.J. 74, 76 (C.M.A. 1983); *Shepardson v. Roberts*, 14 M.J. 354, 357 (C.M.A. 1983).

148. 18 C.M.A. 10, 39 C.M.R. 10 (1969).

149. 1 M.J. 457 (C.M.A. 1976).

150. See *United States v. Draughton*, 42 C.M.R. 447 (A.C.M.R. 1970).

151. 42 C.M.R. 447 (A.C.M.R. 1970).

152. UCMJ art. 66 states, "(e)ach Judge Advocate General shall establish a Court of Military Review." See also Dettinger v. United States, 7 M.J. 216, 219 (C.M.A. 1979). In United States v. Draughton, 42 C.M.R. 447 (A.C.M.R. 1970) the Army Court concluded from this language that Courts of Military Review were established by Act of Congress. The Draughton Court also found the writ power to be an inherent part of the power of any appellate court stating:

The exercise of extraordinary power in the nature of coram nobis which we are called upon to assert involves no more than a court reconsidering its own acts to avoid a manifest miscarriage of justice. Today, we will assert that authority in the petitioner's case before us because we find that we have inherent power and authority to consider the petition and we are empowered on good cause shown to grant the extraordinary relief sought or to take any other act necessary or appropriate in aid of the expressed jurisdiction conferred on us by Congress in 10 U.S.C. Section 866.

United States v. Draughton, 42 C.M.R. 447, 453 (A.C.M.R. 1970). See also Pavlick, supra note 34, 16 n.40.

153. Gagnon v. United States, 42 C.M.R. 1035 (A.F.C.M.R. 1970), citing with approval United States v. Draughton, 42 C.M.R. 447 (A.C.M.R. 1970).

154. Combest v. Bender, 43 C.M.R. 899 (C.G.C.M.R. 1971).

155. 21 C.M.A. 63, 44 C.M.R. 117 (1971).

156. Henderson v. Wondolowski, 21 C.M.A. 63, 64 n.1, 44 C.M.R. 117, 118 n.1 (1971).

157. See Kelly v. United States, 1 M.J. 172 (C.M.A. 1975), cited with approval in Dettinger v. United States, 7 M.J. 216, 219 (C.M.A. 1979). Similar action was taken with respect to the Navy Court of Military Review by the Court of Military Appeals in February 1978. See Ward v. Carey, 4 M.J. 298 (C.M.A. 1978).

158. See *Dettinger v. United States*, 7 M.J. 216, 218 (C.M.A. 1979).

159. The effective date of the UCMJ.

160. See, e.g., *United States v. Homcy*, 18 C.M.A. 515, 40 C.M.R. 227 (1969), but see, e.g., *United States v. Graves*, 39 C.M.R. 438 (A.B.R. 1968) (1928 conviction overturned because of a lack of personal jurisdiction). See also Rankin, supra note 7, at 123; Moyer, supra note 110, at 646.

161. See, e.g., *McLemore v. Chafee*, 20 C.M.A. 680 (1970) (petition for extraordinary relief denied for sentence of a reprimand received from general court-martial). See also Rankin, supra note 7, at 123-124; Moyer, supra note 110, at 646..

162. 23 C.M.A. 219, 49 C.M.R. 8 (1974).

163. *Robison v. Abbott*, 23 C.M.A. 219, 49 C.M.R. 8 (1974). See also *United States v. Bullington*, 13 M.J. 184, 187 n.4 (C.M.A. 1982).

164. 13 M.J. 184 (C.M.A. 1982).

165. In *United States v. Bullington* the Court of Military Appeals stated:

Perhaps *Robison v. Abbott*, supra, deserves reexamination in light of the literal wording of Article 66, for if approval of a punitive discharge provides the basis for conversion of the sentence, in a very real sense, the sentence should be viewed as extending to a bad-conduct discharge. Unlike the power to commute a sentence which is expressly conferred upon the President and the Secretary, Under Secretary or Assistant Secretary of a military department, see Article 71, UCMJ, 10 U.S.C. sec. 871, a convening authority's power to convert a sentence from a punitive discharge to confinement has no express statutory basis...We question whether commutation can be used as a means to circumscribe appellate review

that otherwise would take place under Articles 66 and 67.

Id. at 187 n.4. See also Pepler, Extraordinary Writs in Military Practice, 15 The Advocate 80, 95 (1983).

166. United States v. Bullington, 13 M.J. 184 (C.M.A. 1982).

167. Id.

168. Id.

169. Id.

170. UCMJ art. 67(b)(3); United States v. Bullington, 13 M.J. 184, 186 (C.M.A. 1982).

171. United States v. Bullington, 13 M.J. 184, 186 (C.M.A. 1982).

172. See United States v. Bullington, 13 M.J. 184, 187 (C.M.A. 1982). There are no other exceptions to the rule that the Court of Military Appeals may review all cases reviewed by the Courts of Military Review. The accused may be able to cross-petition for review if the Judge Advocate General certifies a Court of Military Review decision to the Court of Military Appeals for consideration. See United States v. Bullington, 13 M.J. 184, 187 n.2 (C.M.A. 1982); United States v. Kelly, 12 M.J. 183 (C.M.A. 1981).

173. The Court of Military Appeals has stated, "Article 69, Uniform Code of Military Justice, 10 U.S.C. sec. 869, specifically allows the Government to obtain review in the Court of Military Appeals when it would not be available to the accused." United States v. Kelly, 14 M.J. 196 (C.M.A. 1982). See also United States v. Tucker, 20 M.J. 52, 54 n.2 (C.M.A. 1985) (Court of Military Appeals states that it may hear any case reviewed by the Courts of Military Review under UCMJ art. 62).

174. 20 M.J. 335, 336 (C.M.A. 1985).

175. 20 M.J. 356, 358 (C.M.A. 1985).

176. United States v. Browers, 20 M.J. 356 (C.M.A. 1985); United States v. Wilson, 20 M.J. 335 (C.M.A. 1985).

177. 9 M.J. 820 (N.C.M.R. 1980).

178. Bernard v. Commander, 9 M.J. 820, 822 (N.C.M.R. 1980).

179. Bernard v. Commander, 9 M.J. 820, 823 (N.C.M.R. 1980).

The Bernard Court dismissed the extraordinary writ without prejudice and sent the case to the Judge Advocate General for Review under UCMJ art. 69.

180. 1 M.J. 457 (C.M.A. 1976).

181. See United States v. McPhail, 1 M.J. 457 (C.M.A. 1976). But see, Barnett v. Persons, 4 M.J. 934 (A.C.M.R. 1978) (Army Court declines to consider cases absent a statutory grant of jurisdiction and refuses to review a final conviction because no bad-conduct discharge was adjudged).

182. The action of the convening authority in McPhail v. United States, 1 M.J. 457, 458-459 (C.M.A. 1976), was consistent with judicial construction of UCMJ art. 62(a) until the 1976 case of United States v. Ware, 1 M.J. 282 (C.M.A. 1976).

183. McPhail v. United States, 1 M.J. 457, 459 (C.M.A. 1976).

184. McPhail v. United States, 1 M.J. 457, 462-463 (C.M.A. 1976). If the sentence does not qualify for review by a Court of Military Review under UCMJ art. 66(b), the servicemember can appeal to the branch Judge Advocate General. The Judge Advocate General has the power to order a conviction vacated, or take other action as deemed appropriate. See UCMJ art. 69. The McPhail decision cited a trilogy of cases to illustrate the growth of the concept of judicial activism in "aid" of the Court's jurisdiction as the Supreme Court of the Military court-martial system: Gale v. United States, 17 C.M.A. 40, 37 C.M.R. 304 (1967); United States v. Bevilacqua, 18 C.M.A. 10, 39 C.M.R. 10 (1968); and Johnson v. United States, 19 C.M.A. 407, 42 C.M.R. 9 (1970).

185. McPhail v. United States, 1 M.J. 457 (C.M.A. 1976).

186. Id. at 462-463.

187. In *Ussery v. United States*, 16 M.J. 885 (A.F.C.M.R. 1983) the accused did not receive a punitive discharge from the special court-martial. The court held that it had jurisdiction to review the case by extraordinary writ; however, relief was denied.
188. See *Pavlick*, supra note 34, at 28.
189. *McPhail v. United States*, 1 M.J. 457, 462 (C.M.A. 1976), quoting with approval *Virginia v. Rives*, 100 U.S. 313, 323-24 (1879).
190. *Gale v. United States*, 17 C.M.A. 40, 37 C.M.R. 306 (1967). See also *Rankin*, supra note 7, at 116.
191. 9 M.J. 221 (C.M.A. 1976).
192. The opinion does not mention whether the court-martial was empowered to adjudge a bad-conduct discharge.
193. In *Soriano v. Hosken*, 9 M.J. 221, 224 (C.M.A. 1980) the Court of Military Appeals denied the petition on its merits; however, in a concurring opinion, Chief Judge Everett indicated that the military judge may not have recognized that he had discretion in deciding whether to exclude foreign counsel. Judge Cook, dissenting on the merits in *Soriano*, defined the issue as a question of whether the military judge had the power to disqualify the Philippine attorney from representing the accused at court-martial: "If the judge lacks that power, his exclusion of counsel was not merely a mistake in judgement, but a void act. Review of such a ruling is a proper subject of an application for extraordinary relief." *Id.* at 226. See *Peppler*, supra note 165, at 92. See generally *McPhail v. United States*, 1 M.J. 457, 463 (C.M.A. 1976).
194. *Whalen v. Stokes*, 19 C.M.A. 636 (1970). See also *Rankin*, supra note 7, at 124; *Moyer*, supra note 110, at 646.
195. *Thomas v. United States*, 19 C.M.A. 639 (1970). See also, *Rankin*, supra note 7, at 124; *Moyer*, supra note 110, at 646.

196. In re Guadalupe, 18 C.M.A. 649 (1969) (review of service refusal to grant hardship discharge declined); Mueller v. Brown, 18 C.M.A. 534, 40 C.M.R. 246 (1969) (review of conscientious objector status denied).
197. See Dobzynski v. Green, 16 M.J. 84, 89, 92 (C.M.A. 1983). See also Cochran v. United States, 1 Cl.Ct. 759 (Cl.Ct.1983); 10 U.S.C. sec. 1552.
198. See Dobzynski v. Green, 16 M.J. 84, 89 (C.M.A. 1983). See, e.g., United States v. Negrone, 9 M.J. 171 (C.M.A. 1980).
199. 5 M.J. 220 (C.M.A. 1978).
200. Stewart v. Stevens, 5 M.J. 220, 221 (C.M.A. 1978).
201. Id.
202. Stewart v. Stevens, 5 M.J. 220, 222 (C.M.A. 1978). In Stewart Judge Cook commented that he thought that the Court of Military Appeals should possess the power to review all actions under the UCMJ; however, in the face of the clear purpose of Congress to have it otherwise, Judge Cook felt bound to accept the limitations against the court's jurisdiction of UCMJ actions. Id. at 221. See also, Pavlick, supra note 34, at 29-30. However S.Rep.No. 1601, 90th Cong., 2nd Sess., 3 U.S. Code Congressional and Administrative News, 4515 (1968) cited by Judge Cook as the basis for this "explicit" limitation, states:

It has been the experience of all the services in this class of cases, particularly with respect to summary courts-martial cases and those special and general courts-martial cases not reviewable by a board of review [now Court of Military Review], that some provisions should be made for removing the fact of conviction, as well as, granting other relief, in appropriate cases. Since the decision to remove the fact of conviction is a judicial determination based on the traditional legal grounds mentioned in the proposed amendment, it is considered appropriate that the Judge Advocate General should be empowered to

perform this function as well as to grant lesser forms of relief.

Id. at 221 n.2.

This passage does not expressly limit appeals by writ or otherwise to the Judge Advocate General under UCMJ art. 69. The intent of Congress is silent as to whether the review authority is exclusive. In *Jones v. Commander*, 18 M.J. 198, 201 (C.M.A. 1984) (Cook, J., concurring in the result) (Everett, C.J., dissenting) Senior Judge Cook indicated that the intent of Congress was to maintain review by the chain of command alone, based on the testimony before Congress prohibiting servicemembers "attached to or embarked on a vessel" from demanding trial by court-martial. Id. at 199. Chief Judge Everett concluded that the intent of Congress was silent regarding review of nonjudicial actions, and that the general supervisory powers of the Court of Military Appeals was a valid basis for review of nonjudicial actions. Id. at 201.

203. *Stewart v. Stevens*, 5 M.J. 220, 221-222 (C.M.A. 1978). See also *United States v. Booker*, 5 M.J. 246, 248 (C.M.A. 1978). However, Judge Cook, concurring in the result, again cited the language referring to the court's supervisory authority with approval in *United States v. Jackson*, 5 M.J. 223, 228 (C.M.A. 1978). Judge Cook indicated that the *Jackson* majority erroneously relied upon *McPhail* to require formal appointment of counsel for accused placed into pretrial confinement. Judge Cook then mentioned his limitation on *McPhail*'s supervisory mandate in *Stewart v. Stevens*, 5 M.J. 220 (C.M.A. 1978). Id. at 228 n.2.

204. Judge Cook said in *Jones v. Commander*, 18 M.J. 198, 199 (C.M.A. 1984):

In my opinion, this petition for review of a nonjudicial punishment and an administrative discharge is a case in which we simply lack jurisdiction, rather than one in which we have it, but are unwilling to exercise it. Articles 67(b), 66(b), and 69. Uniform

Code of Military Justice, 10 U.S.C. secs. 867(b), 866(b), and 869, respectively; Dobzynski v. Green, 16 M.J. 84 (C.M.A. 1983); Stewart v. Stevens, 5 M.J. 220 (C.M.A. 1978) (Cook, J., concurring).

205. Jones v. Commander, 18 M.J. 198, 199 (C.M.A. 1984) (Fletcher, J., lead opinion); Dobzynski v. Green, 16 M.J. 84 (C.M.A. 1983) (Fletcher, J., lead opinion). See generally, Murray v. Haldeman, 16 M.J. 74, 83 (C.M.A. 1983) (Fletcher, J., concurring in result); (Judge Fletcher considers his reluctant, conservative approach to hearing extraordinary writs to be appropriate); Shepardson v. Roberts, 14 M.J. 354, 359 (C.M.A. 1983) (Fletcher, J., dissenting).

206. United States v. Booker, 5 M.J. 220 (C.M.A. 1978).

207. United States v. Jackson, 5 M.J. 223 (C.M.A. 1978).

But see Pavlick, supra note 34, at 29-30.

208. See Whalen v. Stokes, 19 C.M.A. 636 (1970) (review of nonjudicial punishment under UCMJ art. 15 not in aid of jurisdiction); In re Guadalupe, 18 C.M.A. 649 (review of request for a hardship discharge not in aid of jurisdiction); Mueller v. Brown, 18 C.M.A. 534, 40 C.M.R. 246 (1969) (Court of Military Appeals will not review a denial of conscientious objector discharge). See also Herrod v. Widdecke, 19 C.M.A. 574, 42 C.M.R. 176 (1970); In re Taylor, 12 C.M.A. 427, 31 C.M.R. 13 (1961) (court will not review decertification of military attorney by the Judge Advocate General); United States v. Plummer, 12 C.M.A. 18, 30 C.M.R. 18 (1960); United States v. Armes, 42 C.M.R. 438 (A.C.M.R. 1970) (court will not review request for medical discharge). In Cooke v. Orser, 12 M.J. 335, 346 n.39 (C.M.A. 1982) (Fletcher, J., lead opinion) Judge Fletcher said, "This Court has no jurisdiction over the administrative discharge system of the armed services." In Harms v. United States Military Academy, Misc. Doc. No. 76-58 (C.M.A. Sept. 10, 1976) the Court of Military Appeals denied the petition of Cadet Harms challenging the

administrative discharge of West Point Cadets for violation of the Cadet Honor Code. Although the court denied the petition, the court did require briefs, and oral argument. Cadet Harms was specifically allowed "to reassert any errors after petitioners have exhausted their administrative remedies and provided the sanction of dismissal or its equivalent is imposed." See also Pavlick, supra note 34, at 37. In Jones v. Commander, 18 M.J. 198, 203 n.4 (C.M.A. 1984) (Everett, C.J., dissenting) Chief Judge Everett said:

Petitioner also asked that this Court grant relief with respect to his administrative discharge, which he claims was predicated on the illegal nonjudicial punishment. Since the majority is unwilling to grant relief even as to the nonjudicial punishment, I have not attempted to consider whether administrative discharges-which generally fall outside the purview of the Uniform Code-may be the subject of extraordinary relief from this Court, if based solely on illegal nonjudicial punishment.

209. 20 M.J. 785 (C.G.C.M.R. 1985).

210. In Stewart v. Stevens, 4 M.J. 176 (C.M.A. 1977), petition dismissed without prejudice, 5 M.J. 220 (C.M.A. 1978) the petitioner received nonjudicial punishment under UCMJ art. 15 despite the determination that the military lacked jurisdiction to court-martial Stevens for his drug offenses. Stevens was not allowed to demand trial by courts-martial because he was assigned to a vessel rather than to a shore unit under Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 132 [hereinafter cited as MCM, 1969]. Although the rationale for this rule was not applicable because Steven's ship was docked at a major naval base in the United States, he was forced to accept nonjudicial punishment for an offense that could not be tried by court-martial. The egregious nature of the facts in Stevens almost forced the Court to either set aside the

nonjudicial punishment or admit that it lacked jurisdiction in this area. Two of the three judges were silent as to their reasons for dismissing Stevens' writ. However, JudgeCook clearly stated that he did not think the Court of Military Appeals could consider actions under UCMJ art. 15 without an enabling statute. In March 1978, in a speech attended by two judges of the Court of Military Appeals, the General Counsel of the Department of Defense, Deanne C. Siemer, called for a shifting of final review authority away from the Court of Military Appeals to the Fourth Circuit Court of Appeals in Richmond. See Pavlick, supra note 34, at 12, 38-39. Senator Strom Thurman (R-S.C.) introduced a bill, S. 1353, 95th Cong., 2d Sess. (1975), that would have allowed the Court of Military Appeals to continue to exist, but would have also allowed further appeal by either party to the United States Court of Appeals for the Fourth Circuit. The bill was favorably reported by the Senate Subcommittee on Improvements in the Judicial Machinery in mid-July 1978, and was sent to the full Senate Judiciary Committee. See Pavlick, supra note 34, at 12, 38-39. Finally in the spring of 1978, Deanne C. Siemer recommended, and Congress approved the deletion of \$150,000 from the Court of Military Appeals' budget that was for a neutral and independent study of the military justice system. See Pavlick, supra note 34, at 39. In June 1978, the Court of Military Appeals declined to hear Stevens' writ.

211. 5 M.J. 220 (C.M.A. 1978). In *Stewart v. Stevens*, 5 M.J. 220 (C.M.A. 1978), the charges were withdrawn from court-martial after the military judge determined that the court-martial lacked subject matter jurisdiction, whereas in *Dobzynski v. Green*, 16 M.J. 84 (C.M.A. 1983), the charges were withdrawn after a successful suppression motion by the defense. In all other significant respects the cases are the same. In *Jones v. Commander*, 18 M.J. 198 (C.M.A. 1984), at the conclusion of the government's case

in chief, the military judge granted a motion for a finding of not guilty. The commander administered nonjudicial punishment for two offenses, one of which was the subject of the directed verdict at the court-martial. Subsequently Jones was discharged under less than honorable conditions.

212. 16 M.J. 84 (C.M.A. 1983).

213. *Dobzynski v. Green*, 16 M.J. 84, 85 (C.M.A. 1983).

214. *Dobzynski v. Green*, 16 M.J. 84, 89 (C.M.A. 1983). In *Dobzynski*, Chief Judge Everett stated that part of the court's responsibility under the Code is the protection and preservation of the Constitutional rights of persons in the armed forces. Moreover, Chief Judge Everett decided that the intent of Congress was to confer upon the Court of Military Appeals general supervisory power over the administration of military justice including actions under UCMJ art. 15. *Id.* at 89. Other cases refer to this general supervisory power. See, e.g., *United States v. Frischholz*, 16 C.M.A. 150, 152, 36 C.M.R. 306, 308 (1966); *United States v. Bevilacqua*, 18 C.M.A. 10, 11, 39 C.M.R. 10, 11 (1968). *United States v. Gale*, 17 C.M.A. 40, 42, 37 C.M.R. 304, 306 (1967). In *Dobzynski*, Chief Judge Everett applied the theory of Professor Edward H. Cooper, a leading authority on extraordinary writs, that the flexible process of interpretation characterizing the growth of 28 U.S.C. sec. 1651, and "more diffuse notions of inherent power drawn from the particular needs of the military justice system may be enough to warrant extraordinary relief." *Id.* at 91. A failure of the Court to act under these circumstances was deemed an abdication of a "statutory responsibility to supervise military justice." *Id.* at 91. Chief Judge Everett went on to eschew "the routine review of nonjudicial punishments." *Id.* at 92. See also *Jones v. Commander*, 18 M.J. 198, 200-203 (C.M.A. 1984) (Everett, C.J., dissenting).

215. See *United States v. Browers*, 20 M.J. 356, 358 (C.M.A. 1985).

216. See United States v. Browers, 20 M.J. 356, 358-359 (C.M.A. 1985).
217. Cf. Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 381-382 (1982); Longhofer v. Hilbert, 23 M.J. 755, 758 (A.C.M.R. 1986).
218. Pearson v. Cox, 10 M.J. 317, 319 (C.M.A. 1981); Corley v. Thurman, 3 M.J. 192, 192 (C.M.A. 1977) (Perry, J., dissenting); Longhofer v. Hilbert, 23 M.J. 755, 756 (A.C.M.R. 1986).
219. Shepardson v. Roberts, 14 M.J. 354, 357 (C.M.A. 1983); Longhofer, v. Hilbert, 23 M.J. 755, 757 (A.C.M.R. 1986).
220. Shepardson v. Roberts, 14 M.J. 354, 357 n.3 (C.M.A. 1983).
221. Id.
222. Id.
223. 18 M.J. CXXX (1984).
224. 20 M.J. CXXXI (1985).
225. 23 M.J. CXXVIII (1986).
226. 18 M.J. CXXXI (1984).
227. 20 M.J. CXXXI (1985).
228. 23 M.J. CXXVIII (1986).
229. 18 M.J. CXXXI (1984).
230. 20 M.J. CXXXIII (1985).
231. 23 M.J. CXXVIII (1986).
232. The total for terminations does not equal the total for filings because the Court of Military Appeals has cases pending either at the end of the year, or carried over from the previous year.
233. Fiscal Year 1983 had 285 granted petitions of total of 2798 filed. See 18 M.J. CXXXI (1984). Fiscal year 1984 had 433 granted petitions of 3528 filed. See 20 M.J. CXXXII (1986). Presumably many of the granted petitions in 1983 and 1984 related to issues of multiple specifications for the same offense or applications for administrative credit for pretrial confinement. The percentage of successful extraordinary writs has not significantly changed over the

years. Between 1968 and 1972, the Court of Military Appeals granted relief in less than 15 of more than 200 petitions for extraordinary relief. See Moyer, supra note 110, at 645.

234. Pub. L. No. 98-209, Section 10, 97 Stat. 1393 (1983).

235. UCMJ art. 67(h). See also Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1205 [hereinafter cited as R.C.M.].

236. Gilligan, The Bill of Rights and Service Members, The Army Lawyer, Dec. 1987, at 10.

237. R.C.M. 1202(b)(2).

238. See Rosen, Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial, 108 Mil. L. Rev. 5, 81 (1985).

239. See Middendorf v. Henry, 425 U.S. 25 (1976); Reid v. Covert, 354 U.S. 1 (1957); In re Yamashita, 327 U.S. 1 (1946); Ex parte Vallandingham, 68 U.S. (1 Wall.) 243 (1963); McPhail v. United States, 1 M.J. 457, 462 (C.M.A. 1976). Cox, supra note 4, at 20.

240. See Cox, supra note 4, at 20.

238. See Cox, supra note 4, at 20.

239. See Rosen, supra note 238, at 82.

240. Id.

241. See Cox, supra note 4, at 20.

242. See Solorio v. United States, 107 S.Ct. 2924 (1987); United States v. Goodson, 18 M.J. 243 (C.M.A.), remanded with instructions, 105 S.Ct. 2129 (1986). The Court of Military Appeals ultimately reversed Goodson's conviction. United States v. Goodson, 23 M.J. 319 (C.M.A. 1987).

243. UCMJ art. 70, states:

Art. 70. Appellate counsel

(a) The Judge Advocate General shall detail in his office one or more commissioned officers as appellate Government counsel, and one or more commissioned officers as appellate defense counsel, who are qualified under section 827(b)(1) of this title (article 27(b)(1)).

(b) Appellate Government counsel shall represent the United States before the Court of Military Review or the Court of Military Appeals when directed to do so by the Judge Advocate General.

(c) Appellate defense counsel shall represent the accused before the Court of Military Review or the Court of Military Appeals-

(1) when he is requested to do so by the accused;

(2) when the United States is represented by counsel; or

(3) when the Judge Advocate General has sent a case to the Court of Military Appeals.

(d) The accused has a right to be presented before the Court of Military Appeals or the Court of Military Review by civilian counsel if provided by him.

(e) Military appellate counsel shall also perform such other functions in connection with the review of court-martial cases as the Judge Advocate General directs.

See also United States v. Montcalm, 2 M.J. 787, 793 (A.C.M.R. 1976).

244. Compare United States v. Foxworth, 2 M.J. 508, 509-510 (A.C.M.R. 1976) (military appellate counsel not allowed to file writ of error coram nobis on behalf of accused because accused failed to personally request filing of writ), with Brooks v. United States, 2 M.J. 1257, 1259 (A.C.M.R. 1976) (military appellate defense counsel allowed to file writ of error coram nobis despite failure of accused to request military appellate counsel after case became final due to close temporal proximity between decision of Army Court of Military Review and filing of writ).

245. See United States v. Catt, 1 M.J. 41 (C.M.A. 1975); United States v. Foxworth, 2 M.J. 508 (A.C.M.R. 1976); United States v. Montcalm, 2 M.J. 787, 790 (A.C.M.R. 1976); United States v. Brooks, 2 M.J. 1257 (A.C.M.R. 1976).

246. In Pearson v. Cox, 10 M.J. 317, 319 (C.M.A. 1981) the Court of Military Appeals said that it was "desirable" to file with the Court of Military Review first; however, this was not required. See Soriano v. Hosken, 9 M.J. 221, 226 (C.M.A. 1980) (Cook J., dissenting) (requests for relief should be presented first to the Court of Military Review); United States v. Redding, 11 M.J. 100, 106 (C.M.A. 1981). On its own motion the Court of Military Appeals may remand a case to the Court of Military Review. See, e.g., Shepardson v. Roberts, 14 M.J. 140 (C.M.A. 1983) (military judge refused to enforce a pretrial agreement, and the appellant immediately sought relief at the Court of Military Appeals); Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982) (writ filed immediately at Court of Military Appeals after ruling by military judge). But see, e.g., Duncan v. Usher, 23 M.J. 29 (C.M.A. 1986) (writ of habeas corpus regarding in personam jurisdiction filed at Court of Military Appeals, after denial by military judge at court-martial, denial by convening authority, and denial by Air Force Court of Military Review). There is some historical basis for a requirement to apply to the general court-martial convening authority for relief under UCMJ art. 138 in situations involving pretrial confinement prior to filing an extraordinary writ. See Catlow v. Cooksey, 21 C.M.A. 106, 44 C.M.R. 160 (1971); Dale v. United States, 19 C.M.A. 254, 41 C.M.R. 254 (1970). The Court of Military Appeals has implied that UCMJ art. 138 should be exhausted prior to filing an extraordinary writ, but has not enforced this requirement in other than early pretrial confinement cases. See Moyer, supra note 110, at 656.

247. 23 M.J. 140 (C.M.A. 1986).

248. *Burt v. Schick*, 23 M.J. 140, 142 (C.M.A. 1986). In *Shepardson v. Roberts*, 14 M.J. 354, 357 (C.M.A. 1983) the defense requested that the military judge enforce a pretrial agreement. This motion was denied and the appellant applied directly to the Court of Military Appeals for relief. The appellant's petition was heard on the merits and denied. See also *Chenoweth v. Van Arsdale*, 22 C.M.A. 183, 188, 46 C.M.R. 183, 188 (1973).

249. See *Duncan v. Usher*, 23 M.J. 29 (C.M.A. 1986).

250. *McPhail v. United States*, 1 M.J. 457, 462 n.4 (C.M.A. 1976); *United States v. Frischholz*, 16 C.M.A. 150, 36 C.M.R. 306 (1966); *Del Prado v. United States*, 23 C.M.A. 132, 48 C.M.R. 748 (1974).

251. See, e.g., *Woodrick v. Divich*, 24 M.J. 147 (C.M.A. 1987).

252. See, e.g., Court of Military Appeals Rules of Practice and Procedure, 15 M.J. CXV-CLIV (July 1, 1983).

253. See *Pepler*, supra note 165, at 96.

254. See *United States v. Sumpter*, 22 M.J. 33 (C.M.A. 1986) (rules for filing out-of-time petitions provided); *United States v. Matthews*, 22 M.J. 101 (C.M.A. 1986) (summary disposition) (motion to dismiss granted because appellant's counsel failed to respond to motion within required 30 day period). See also *United States v. Haskins*, 17 M.J. 64 (C.M.A. 1983) (interlocutory order).

255. See *United States v. Johnson*, 22 M.J. 20 (C.M.A. 1986) (interlocutory order) (motion granted to exceed page limitation). But see, e.g., *United States v. Cruz*, 22 M.J. 255 (C.M.A. 1986) (interlocutory order) (motion denied because there was no demonstration of need).

256. See *United States v. Loguda*, 19 M.J. 307 (C.M.A. 1985) (interlocutory order) (affidavit accepted but unsworn statement rejected); *United States v. Perkinson*, 16 M.J. 400, 402 (C.M.A. 1983) (convening authority's affidavit rejected); *United States v. Rosario*, 13 M.J. 552 (A.C.M.R. 1982) (affidavit accepted). Court policy will often have

the most important weight in the decision whether to accept matters outside the record of trial, and the form of those matters. See, e.g., United States v. Davenport, 9 M.J. 364, 367 (C.M.A. 1980) (guilty plea); United States v. Davis, 3 M.J. 430, 431 n.1 (C.M.A. 1977) (ineffective counsel). In United States v. Williams, 17 M.J. 207 (C.M.A. 1984) the Court of Military Appeals stated that it could take judicial notice of "indisputable facts" but declined because the facts in Williams were unclear. See also United States v. Jackson, 18 M.J. 403 (C.M.A. 1984) (summary disposition) (judicial notice of jurisdiction declined); United States v. Zupan, 17 M.J. 103 (C.M.A. 1984) (judicial notice of jurisdiction accepted).

257. Ferencik, Appellate Advocacy, 27 A.F.L.Rev. 221 (1987) provides a useful summary of ideas regarding content and style of appellate briefs. Morgan, Appellate Practice Rules, 27 A.F.L.Rev. 229 (1987) provides specific guidance regarding procedural rules and oral appellate advocacy.

258. Court of Military Appeals Rule of Practice and Procedure 4(b)(1), 15 M.J. CXIX (July 1, 1983).

259. Id.

260. See United States v. Redding, 11 M.J. 100, 104 (C.M.A. 1981); United States v. Best, 6 C.M.A. 39, 44, 19 C.M.R. 165, 170 (1955).

261. See United States v. Morrison, 449 U.S. 361 (1981); United States v. Redding, 11 M.J. 100, 104 (C.M.A. 1981); United States v. Quinones, 1 M.J. 64 (C.M.A. 1975); United States v. Johnson, 23 C.M.A. 148, 48 C.M.R. 764 (1974).

262. In Soriano v. Hosken, 9 M.J. 221 (C.M.A. 1980) Judge Fletcher felt that the matter of the qualification of foreign counsel should be resolved by direct appeal rather than by extraordinary writ. Chief Judge Everett, in a concurring opinion, stated that the military judge had broad discretion to determine counsel's qualifications to practice, and would not disturb this discretionary ruling. Judge Cook, dissenting, strongly attacked the majority and

would have reversed the action of the trial judge in barring foreign civilian counsel from acting as chief defense counsel.

263. See, e.g., West v. Samuel, 21 C.M.A. 290, 45 C.M.R. 64 (1972) (denial of severance of charges); Henderson v. Wondolowski, 21 C.M.A. 63, 44 C.M.R. 117 (1971) (refusal to dismiss charge and clarify specification); Davis v. Qualls, 7 M.J. 267 (C.M.A. 1979) (summary disposition) (the court found the argument for the production of the witness to be persuasive, but refused to grant the writ of mandamus). See also, Moyer, supra note 110, at 655.

264. See, e.g., Conmy v. United States, 20 C.M.A. 282, 43 C.M.R. 122 (1971) (denial of continuance). See also, Moyer, supra note 110, at 655.

265. See, e.g., Osborne v. Bowman, 20 C.M.A. 385, 43 C.M.A. 225 (1971). (challenge to qualification of UCMJ art. 32 investigating officer); MacDonald v. Hodson, 19 C.M.A. 582, 42 C.M.R. 184 (1970) (closing UCMJ art. 32 hearing to public). See also, Moyer, supra note 110, at 655.

266. See, e.g., Higdon v. United States, 20 C.M.A. 681, (1970) (refusal to grant new pretrial advice). Green v. Convening Authority, 19 C.M.A. 576, 42 C.M.R. 178 (1970) (referral to trial after grant of use immunity, method of selecting court members, and failure to follow recommendation of investigating officer). See also, Moyer, supra note 110, at 655.

267. UCMJ art. 57(d) states in pertinent part:

On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement.

See also Reed v. Ohman, 19 C.M.A. 110, 41 C.M.R. 110 (1969); Levy v. Resor, 17 C.M.A. 135, 37 C.M.R. 399 (1967); United States v. Howard, 2 C.M.A. 519, 10 C.M.R. 17 (1953). 268. See United States v. Bynum, 344 F.Supp. 647 (S.D.N.Y. 1972); Corley v. Thurman, 5 M.J. 192, 194 (C.M.A. 1978) (Perry, J., dissenting).

269. See United States ex rel. Siegal v. Follette, 290 F.Supp. 632 (S.D.N.Y. 1968); Corley v. Thurman, 5 M.J. 192, 194 (C.M.A. 1978) (Perry, J., dissenting).

270. See Bloss v. Michigan, 421 F.2d 903 (6th Cir. 1970); Corley v. Thurman, 5 M.J. 192, 194 (C.M.A. 1978) (Perry, J., dissenting).

271. 19 C.M.A. 110, 41 C.M.R. 110 (1969).

272. Pearson v. Cox, 10 M.J. 317 (C.M.A. 1981); United States v. Brownd, 6 M.J. 338, 339 (C.M.A. 1979) (convening authority abused discretion when deferment was denied; however, issue of deferment was moot because accused had served all confinement); Longhofer v. Hilbert, 23 M.J. 755, 757 (A.C.M.R. 1986); R.C.M. 1103.

273. Corley v. Thurman, 5 M.J. 192, 195 (C.M.A. 1978) (Perry, J., dissenting).

274. See Longhofer v. Hilbert, 23 M.J. 755 (A.C.M.R. 1986); Analysis of Rule for Courts-Martial 1101, App. 21, A21-69.

275. Green v. Wylie, 20 C.M.A. 391, 43 C.M.R. 231 (1970); United States v. Daniels, 19 C.M.A. 518, 42 C.M.R. 120 (1970); Collier v. United States, 19 C.M.A. 511, 42 C.M.R. 113 (1970); Reed v. Ohman, 19 C.M.A. 110, 41 C.M.R. 110 (1969); Levy v. Resor, 17 C.M.A. 135, 37 C.M.R. 399 (1967). See also Corley v. Thurman, 5 M.J. 192 (C.M.A. 1978) (Perry, J., dissenting). But see Pearson v. Cox, 10 M.J. 317, 321 (C.M.A. 1981) (Cook, J., dissenting) (no judicial review of deferment decision by convening authority); United States v. Brownd, 6 M.J. 338, 341 (C.M.A. 1979) (Cook, J., dissenting).

275. Corley v. Thurman, 5 M.J. 192, 196 (C.M.A. 1978) (Perry, J., dissenting).

276. Collier v. United States, 19 C.M.A. 511, 515, 42 C.M.R. 113, 117 (1970); Corley v. Thurman, 5 M.J. 192, 197 (C.M.A. 1978) (Perry, J., dissenting).
277. 18 U.S.C. secs. 3144-3152. See also Corley v. Thurman, 5 M.J. 192, 196 (C.M.A. 1978) (Perry, J., dissenting).
278. United States v. Heard, 3 M.J. 14 (C.M.A. 1977); Corley v. Thurman, 5 M.J. 192, 197 (C.M.A. 1978) (Perry, J., dissenting).
279. Levy v. Resor, 17 C.M.A. 135, 139, 37 C.M.R. 399, 403 (1967); Corley v. Thurman, 5 M.J. 192, 197 (C.M.A. 1978) (Perry, J., dissenting).
280. Harris v. United States, 404 U.S. 1232, 1235-6 (1971) (Douglas, Circuit Judge), quoted with approval in Corley v. Thurman, 5 M.J. 192, 198 (C.M.A. 1978) (Perry, J., dissenting).
281. In Duncan v. Usher, 23 M.J. 29, 31 (C.M.A. 1986) the Court of Military Appeals stated that pending reargument the accused should be released from confinement. Master Sergeant Duncan's conviction was later reversed for lack of in personam jurisdiction.
282. See United States v. Heard, 3 M.J. 14, 23 (C.M.A. 1977); United States v. Larner, 1 M.J. 371 (C.M.A. 1976). See also Corley v. Thurman, 5 M.J. 192, 193 (C.M.A. 1978) (Perry, J., dissenting). In Longhofer v. Hilbert, 23 M.J. 755, 757 (A.C.M.R. 1986) the Army Court stated:
- [w]hen an accused is convicted by court-martial and sentenced to limited confinement, a convening authority could summarily and arbitrarily deny an application for deferment knowing that confinement will have been served by the time his action is reviewed on direct appeal. As Chief Judge Marshall stated 'for if the means be not in existence, the privilege itself would be lost...' Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 2 L.Ed. 554 (1807). Here, if our extraordinary powers under supervisory mandamus are

not exerted, the rationale for deferment, as reflected by Congressional concerns, will be defeated.

However, in *Pearson v. Cox*, 10 M.J. 317, 319 (C.M.A. 1981) the Court of Military Appeals cautioned that the broad discretion of the convening authority regarding deferment decisions should rarely be disturbed. If the decision is "suffused with legal error" then extraordinary relief is available. See *Trotman v. Haebel*, 12 M.J. 27 (C.M.A. 1981) (writ of habeas corpus to order deferment of confinement denied); *United States v. Brown*, 6 M.J. 338 (C.M.A. 1979).

283. *Longhofer v. Hilbert*, 23 M.J. 755, 759 (A.C.M.R. 1986).

284. *Longhofer v. Hilbert*, 23 M.J. 755, 760 (A.C.M.R. 1986).

285. See *Levy v. Laird*, 18 C.M.A. 131, 39 C.M.R. 131 (1969).

286. *Collier v. United States*, 19 C.M.A. 511, 42 C.M.R. 113 (1970); *Reed v. Ohman*, 19 C.M.A. 110, 41 C.M.R. 110 (1969); Pavlick, supra note 34, at 33.

287. Cooke, The United States Court of Military Appeals, 1976-1977: Judicializing the Military Justice System, 76 Mil. L. Rev. 43, 84-86 (1977), Pavlick, supra note 34, at 33.

288. See, e.g., *Phillips v. McLucas*, 23 C.M.A. 679, 50 C.M.R. 914 (C.M.A. 1975); Pavlick, supra note 34, at 33.

289. See *Courtney v. Williams*, 1 M.J. 267 (1976); Pavlick, supra note 34, at 33.

290. *Richards v. Deuterman*, 13 M.J. 990 (N.M.C.M.R. 1982); *United States v. Lamb*, 6 M.J. 542 (N.C.M.R. 1978); *United States v. Burke*, 4 M.J. 530 (N.C.M.R. 1977).

291. *United States v. Palmiter*, 20 M.J. 90, 97 (C.M.A. 1985).

292. UCMJ art. 44 reads in pertinent part:

- a) No person may, without his consent, be tried a second time for the same offense.

(b) No proceeding in which an accused has been found guilty by court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.

(c) A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article.

293. 23 M.J. 140 (C.M.A. 1986).

294. *Burt v. Schick*, 23 M.J. 140 (C.M.A. 1986).

295. See, e.g., *United States v. Cole*, 24 M.J. 18 (C.M.A. 1987) (discharge terminates jurisdiction). In *Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981) Judge Cook ordered the accused's stay on the court-martial dissolved based on the merits of the issue. Judge Fletcher, in a concurring opinion, voted to dismiss the petition without deciding the merits of the case. Chief Judge Everett, dissenting, would have granted the petition denying the jurisdiction of the court-martial pending a determination by civilian courts as to whether Wickham's discharge was valid. See also *Wickham v. Hall*, 706 F.2d 713 (5th Cir. 1983); *United States v. Clardy*, 13 M.J. 306 (C.M.A. 1982), cited with approval in *Duncan v. Usher*, 23 M.J. 29, 36-41 (C.M.A. 1986) (Sullivan, J., concurring); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (UCMJ art. 3a unconstitutional, and no court-martial jurisdiction over a sergeant that allegedly committed a homicide in Korea before being discharged from the Air Force); *United States v. Wheeler*, 10 C.M.A. 646, 28 C.M.R. 212 (1959) (court-martial jurisdiction existed because accused reservist requested return to active duty after being discharged for the express purpose of being court-martialed in order to avoid potential trial by German authorities). In *Zamora v. Wilson*, 19 C.M.A. 403, 42 C.M.R.

5 (1970), pending proceedings against Zamora, a civilian serving in Vietnam, were terminated because the conflict was not "time of war". See also, Woodrick v. Divich, 24 M.J. 147 (C.M.A. 1987); Duncan v. Usher, 23 M.J. 29 (C.M.A. 1986). In United States v. Caputo, 18 M.J. 259 (C.M.A. 1984) the accused committed offenses during a short tour of active duty for training. Then the accused returned to inactive reserve status. Caputo subsequently returned to active duty. Trial by court-martial was barred due to lack of personam jurisdiction caused by the break in service. See generally Parisi v. Davidson, 405 U.S. 34 (1972).

296. 23 M.J. 29 (C.M.A. 1986).

297. Washington v. Greenwald, 20 M.J. 699 (A.C.M.R.), writ appeal denied, 20 M.J. 196 (C.M.A. 1985).

298. See Rhoades v. Haynes, 22 C.M.A. 189, 46 C.M.R. 189 (1973); Thornton v. Joslyn, 47 C.M.R. 414 (A.C.M.R. 1973) (convening authority ordered to authenticate record and take action pursuant to UCMJ art. 60 prior to certain date); Pavlick, supra note 34, at 21.

299. See Whitfield v. United States, 4 M.J. 289 (C.M.A. 1978) (considering the nature of restraint at the United States Army Retraining Brigade, Fort Riley, Kansas); Thomas v. United States, 1 M.J. 175 (C.M.A. 1975) (considering continued confinement in the United States Disciplinary Barracks in contravention of Army regulations and the UCMJ); Collier v. United States, 19 C.M.A. 511, 42 C.M.R. 113 (1970) (considering the convening authority's decision to reconfine an accused after his release, pending completion of appellate review); Pavlick, supra note 34, at 22. See also United States v. Palmiter, 20 M.J. 90, 97 (C.M.A. 1985) (illegal conditions in pretrial confinement facilities).

300. Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982).

301. See Halfacre v. Chambers, 5 M.J. 1099 (C.M.A. 1976) (stay in court-martial continued until petitioner and defense counsel return from round trip to Karachi, Pakistan

at government expense). But see generally *Hutson v. United States*, 42 C.M.R. 512 (A.C.M.R. 1970) (request for defense investigative agent denied).

302. 20 C.M.A. 438, 43 C.M.R. 278 (1971).

303. *Petty v. Moriarty*, 20 C.M.A. 438, 43 C.M.R. 278 (1971).

304. 144 U.S. 310 (1892).

305. Id. at 326.

306. Cooley & Scott, The Role of the Prosecutor in Government Appeals, *The Army Lawyer*, Aug. 1986 at 39.

307. 34 Stat. 1246 (1907).

308. See *United States v. Sisson*, 399 U.S. 267, 298 (1970). Justice Harlan, writing for the majority, and Chief Justice Burger, dissenting, provide a thorough discussion of the history of government appeals.

309. See Cooley & Scott, supra note 306, at 39. See also Note, Government Appeals of "Dismissals" in Criminal Cases, 87 Harv. L. Rev. 1822, 1825 (1974).

310. See *United States v. Sisson*, 399 U.S. 267, 296 (1970).

311. Id. at 295-296.

312. Id. at 295-296.

313. Id. at 295-296.

314. Id. at 291-292.

315. *Carroll v. United States*, 354 U.S. 394, 400 (1957); *United States v. Keitel*, 211 U.S. 370, 399 (1908); Cooley & Scott, supra note 306, at 39.

316. *United States v. Sisson*, 399 U.S. 267, 296, 307-308 (1970).

317. Pub. L. No. 91-644, 84 Stat. 1880, 1890 sec. 14 (1971).

318. The Act was effective on January 2, 1971. It is occasionally referred to as the Criminal Appeals Act of 1970. See C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* sec. 3919 (1976). It is contained in Title 18 U.S.C. sec. 3731. See Cooley & Scott, supra note 306, at 40.

319. See United States v. Wilson, 420 U.S. 332, 337 (1975). See also United States v. Humphries, 636 F.2d 1172, 1175 (9th Cir. 1980), cert. denied, 451 U.S. 988 (1981); United States v. Hetrick, 644 F.2d 752, 755 (9th Cir. 1980); United States v. Robinson, 593 F.2d 573 (4th Cir. 1979), but see United States v. Browers, 20 M.J. 356, 360 (C.M.A. 1985) (Cox, J., concurring) where the Judge Cox commented, "(T)he Government should use Article 62, Uniform Code of Military Justice, 10 U.S.C. sec. 862 sparingly". Cooley & Scott, supra note 306, at 40 n.25.

320. 17 C.M.A. 530, 532, 38 C.M.R. 328, 330 (1968).

321. See, Dettinger v. United States, 7 M.J. 216, 221 (C.M.A. 1979).

322. See United States v. Ware, 1 M.J. 282 (C.M.A. 1976). The Ware decision left the government "with no means of appeal from an adverse ruling of the trial judge" that erroneously dismissed charges referred to trial. Dettinger v. United States, 7 M.J. 216, 221 (C.M.A. 1979). In United States v. Rowel, 1 M.J. 289, 291 (C.M.A. 1976) (Fletcher, C.J., concurring) Chief Judge Fletcher recommended that Congress pass a statute, applicable to the military, similar to 18 U.S.C. sec. 3731.

323. 7 M.J. 216 (C.M.A. 1979).

324. Dettinger v. United States, 7 M.J. 216, 221-222 (C.M.A. 1979).

325. Dettinger v. United States, 7 M.J. 216, 220 (C.M.A. 1979).

326. See Dettinger v. United States, 7 M.J. 216, 220 (C.M.A. 1979), quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). See also McPhail v. United States, 1 M.J. 457, 461 (C.M.A. 1976).

327. Dettinger v. United States, 7 M.J. 216, 224 (C.M.A. 1979).

328. See Pepler, supra note 165, at 91.

329. See United States v. Redding, 11 M.J. 100, 104 (C.M.A. 1981); Dettinger v. United States, 7 M.J. 216, 217 (C.M.A. 1979).

330. United States v. Redding, 8 M.J. 719, 722 (N.C.M.R. 1979), rev'd, 11 M.J. 100 (C.M.A. 1981).

331. United States v. Redding, 11 M.J. 100, 106 (C.M.A. 1981).

332. United States v. Redding, 11 M.J. 100, 110 (C.M.A. 1981).

333. United States v. Redding, 11 M.J. 100, 110 (C.M.A. 1981).

334. United States v. Redding, 11 M.J. 100 (C.M.A. 1981).

335. United States v. Caprio, 12 M.J. 321 (C.M.A. 1981).

336. United States v. Strow, 11 M.J. 75 (C.M.A. 1981).

337. In United States v. LaBella, 15 M.J. 228, 229 (C.M.A. 1983) the Court of Military Appeals stated:
The writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary circumstances.
Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980); Will v. United States, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967); Platt v. Minnesota Mining & Manufacturing Co., 376 U.S. 240, 84 S.Ct. 769, 11 L.Ed.2d 674 (1964). We have permitted issuance of the writ to 'confine and inferior court to a lawful exercise of its prescribed jurisdiction.' Dettinger v. United States, 7 M.J. 216, 220 (C.M.A. 1979), quoting from Roche v. Evaporated Milk Association, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943), see also United States v. Redding, 11 M.J. 100 (C.M.A. 1981)...A motion to dismiss for lack of jurisdiction is an interlocutory matter addressed to the discretion of the military judge...and his decision will be reviewed on the test of abuse of discretion as are other decisions on interlocutory matters. United States v. Buckingham, 9 M.J. 514 (A.F.C.M.R. 1980), aff'd, 11 M.J. 184 (C.M.A. 1981). To justify reversal of a discretionary decision by mandamus, the judicial decision

must amount to more than even 'gross error'; it must amount 'to a judicial "usurpation of power,"' United States v. DeStefano, 464 F.2d 845, 850 (2d Cir. 1972), or be 'characteristic of an erroneous practice which is likely to recur.(citations omitted)'

The party seeking mandamus relief has the burden of showing that it has a clear and indisputable right to the issuance of the writ. See Harrison v. United States, 20 M.J. 55 (C.M.A. 1985); Satterfield v. Drew, 17 M.J. 269 (C.M.A. 1984); United States v. Mahoney, 24 M.J. 911, 914 (A.F.C.M.R. 1987) (writ of mandamus denied regarding application of new burden governing defense of lack of mental responsibility); United States v. Strow, 10 M.J. 647 (N.C.M.R. 1980) (writ of mandamus denied where petition sought review of correctness of findings that certain periods of delay for speedy trial purposes were not excludable as having resulted from extraordinary circumstances).

338. United States v. Bogan, 13 M.J. 768 (A.C.M.R. 1982).

339. In support of the "clearly erroneous" standard the Navy-Marine Court in United States v. Wholley, 13 M.J. 574, 579 (N.M.C.M.R. 1982) stated:

When a trial judge's ruling is clearly erroneous, even though it has issued in regard to a legitimate subject of judicial discretion, the ability and power of an appellate court to reverse that ruling has been a long recognized principle of American jurisprudence. See Burns v. United States, 287 U.S. 216, 222-23, 52 S.Ct. 154, 156-57, 77 L.Ed. 266, 270 (1932); Langnes v. Green, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520 (1930); United States v. Perez, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824); United States v. Glenn, 473 F.2d 191, 196 (D.C.Cir. 1972); United States v. Hardin, 443 F.2d 735, 737 (D.C.Cir. 1971); Beausoliel v. United States, 107 F.2d 292, 294-95 (D.C.Cir. 1939).

340. See United States v. Rowel, 1 M.J. 289, 291 (C.M.A. 1976); United States v. Pereira, 13 M.J. 632, 636 n.10 (A.F.C.M.R. 1982) (Air Force Court urges Congress to take action to make government appeals easier).

341. Pub. L. No. 98-209, 97 Stat. 1393 (1983).

UCMJ art. 62, 10 U.S.C. sec. 862 (Supp II 1984) states:

Art. 62 Appeal by the United States

(a) (1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceeding. However, the United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification.

(2) An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling. Such notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceedings.)

(3) An appeal under this section shall be diligently prosecuted by appellate Government counsel.

(b) An appeal under this section shall be forwarded by a means prescribed under regulations of the President directly to the Court of Military Review and shall, whenever practicable, have priority over all other proceedings before that court. In ruling on an appeal under this section, the Court of Military Review may

act only with respect to matters of law, notwithstanding section 866(c) of this title (article 66(c)).

(c) Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for purpose of delay with the knowledge that it was totally frivolous and without merit.

342. R.C.M. 908(a).

343. See, e.g., Dep't of Army, Reg. No. 27-10, Legal Services-Military Justice, Chapter 13 (10 July 1987) [hereinafter cited as AR 27-10].

344. See, e.g., Dep't of Army, Pam. No. 27-173, Legal Services-Trial Procedure, para. 23-1 (15 Feb. 1987) [hereinafter cited as DA Pam. 27-173].

345. 18 U.S.C. 3731 (1984) reads in pertinent part:

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgement, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgement, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution. An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for the purpose of delay and that the evidence is a substantial part of a fact material in the proceeding...

United States v. Tucker, 20 M.J. 52, 53 (C.M.A. 1985). The Tucker Court determined that Congressional intent was to insure that UCMJ Art. 62 is interpreted in a manner similar to 18 U.S.C. sec. 3731. See S. Rep. No. 98-53, 98th Congress, 1st Sess. 23 (Military Justice Act of 1983) (statement of William Taft IV, General Counsel of Dept. of Defense); The Military Justice Act of 1980: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 97th Cong., 2d Sess. 33, 46 (1982) (statement of Major General Hugh J. Clausen, The Judge Advocate General, U.S. Army), cited with approval in United States v. Austin, 21 M.J. 592, 596 (A.C.M.R. 1985); United States v. Browers, 20 M.J. 542, 557 (A.C.M.R.), rev'd on other grounds, 20 M.J. 356 (C.M.A. 1985). See also United States v. Scholz, 19 M.J. 837, 840-841 (N.M.C.M.R. 1984); Cooley & Scott, supra note 306, at 40. 346. Arizona v. Manypenny, 451 U.S. 232 (1981). 347. 20 M.J. 356 (C.M.A. 1985). 348. United States v. Browers, 20 M.J. 356, 360 (C.M.A. 1985). 349. See, e.g., Solorio v. United States, 107 S.Ct. 2924 (1987) (accused may petition the Supreme Court from adverse decision of the Court of Military Appeals); United States v. Tucker, 20 M.J. 52 (C.M.A. 1985) (the accused may appeal decisions by the Courts of Military Review under UCMJ art. 62 to the Court of Military Appeals). See generally United States v. Scott, 437 U.S. 82 (1978). 350. In United States v. Browers, 20 M.J. 542, 548 (A.C.M.R.), rev'd on other grounds, 20 M.J. 356 (C.M.A. 1985) the Army Court commented:

...[t]here is every reason to believe that appellee's prediction of an avalanche of interlocutory appeals as a result of the admittedly broad scope of the effects test simply will not come true...Finally, and perhaps most persuasively, during the fourteen years in which 18 U.S.C. sec. 3731 has been in effect in its present

broad form, the reported cases involving its use in the Article III courts average less than one case in each district every two years; the military experience cannot be expected to be substantially different.

351. R.C.M. 908 analysis. See also DA Pam. 27-173, para. 23-1.

352. DA Pam. 27-173, para. 23-1.

353. Id. at para. 23-4.

354. UCMJ art. 62(a)(1); DA Pam. 27-173, para. 23-5. In *United States v. Mahoney*, 24 M.J. 911 (A.F.C.M.R. 1987) the Air Force Court held that the military judge's determination that new burden for showing the defense of lack of mental responsibility did not apply could not be appealed under UCMJ art. 62 because it did not exclude evidence, or terminate the proceeding with respect to a charge or specification.

355. See UCMJ art. 62(a)(1); R.C.M. 908 (a); DA Pam. 27-173, para. 23-5. In *United States v. Mayer*, 21 M.J. 504 (A.F.C.M.R. 1985) the Air Force Court upheld the trial judge's refusal to admit evidence of other acts of the accused to show the intent of the accused to commit the charged offense without discussing the requirement that the excluded evidence be "substantial proof of a fact material." See also, e.g., *United States v. Rodriguez*, 23 M.J. 896 (A.C.M.R. 1987) (suppression of urinalysis test result reversed). But see, e.g., *United States v. Austin*, 21 M.J. 592 (A.C.M.R. 1985) (suppression of urinalysis test result upheld).

356. See, e.g., *Solario v. United States*, 107 S.Ct. 2924 (1987); *United States v. Abell*, 23 M.J. 99 (C.M.A. 1986) (trial judge's dismissal for lack of subject matter jurisdiction reversed); *United States v. Howard*, 20 M.J. 353 (C.M.A. 1985).

357. See, e.g., United States v. Burris, 20 M.J. 707 (A.C.M.R.), rev'd, 21 M.J. 140 (C.M.A. 1985) (termination for lack of speedy trial appealable, but trial judge upheld).

358. See, e.g., United States v. Ermitano, 19 M.J. 626 (N.M.C.M.R. 1984).

359. DA Pam. 27-173, para. 23-5.

360. Id. See generally UCMJ art. 44.

361. United States v. Scott, 437 U.S. 82, 96 (1976); DA Pam. 173, para. 23-5.

362. See United States v. Scholz, 19 M.J. 837, 841 (N.M.C.M.R. 1984). But see United States v. Browers, 20 M.J. 356, 361 (C.M.A. 1985) (mere weakening of government's case, through suppression of evidence, insufficient to justify government appeal).

363. DA Pam. 27-173, para. 23-5.

364. See United States v. Penn, 21 M.J. 907 (N.M.C.M.R. 1986); United States v. Browers, 20 M.J. 542 (A.C.M.R.), rev'd 20 M.J. 356 (C.M.A. 1985).

365. U.S. Const. See United States v. Jorn, 400 U.S. 470 (1971); United States v. Sisson, 399 U.S. 267 (1970); Will v. United States, 389 U.S. 90 (1967).

366. R.C.M. 915. See, e.g., United States v. Dinitz, 424 U.S. 600 (1976); Illinois v. Sommerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U.S. 470 (1971).

367. In United States v. Browers, 20 M.J. 542 (A.C.M.R.), rev'd 20 M.J. 356 (C.M.A. 1985) the government lacked jurisdiction to appeal the trial judge's denial of a government requested continuance. The Court of Military Appeals rejected the government contention that the denied continuance caused a vital government witness not to testify because the witness was not available. The government argued that this lack of testimony caused an acquittal.

368. In *United States v. Penn*, 21 M.J. 907 (N.M.C.M.R. 1986) the government lacked jurisdiction to appeal the military judge order of a new UCMJ art. 32 investigation. The Court of Military Appeals rejected the government contention that the new UCMJ art. 32 investigation would cause sufficient delay to cause the charges to be dismissed for lack of speedy trial.
369. R.C.M. 908(b)(1); *United States v. Browers*, 20 M.J. 542, 544-545 (A.C.M.R.), rev'd, 20 M.J. 356 (C.M.A. 1985); *Cooley & Scott*, supra note 306, at 40.
370. Id.
371. *Cooley & Scott*, supra note 306, at 40.
372. *United States v. Mayer*, 21 M.J. 504, 506 (A.F.C.M.R. 1985).
373. See *United States v. Browers*, 20 M.J. 356, 359 (C.M.A. 1985); *United States v. Hitchmon*, 602 F.2d 689, 692 (5th Cir. 1979) (en banc). See generally *United States v. Grabinski*, 674 F.2d 677, 679-80 (8th Cir.) (en banc), cert. denied, 459 U.S. 829 (1982); *United States v. Leppo*, 634 F.2d 101, 104-05 (3d Cir. 1980).
374. 20 M.J. 356, 359-360 (C.M.A. 1985).
375. *United States v. Browers*, 20 M.J. 356 (C.M.A. 1985).
376. AR 27-10, para. 13-3a.
377. See *United States v. Harrison*, 20 M.J. 55 (C.M.A. 1985); *United States v. Tucker*, 20 M.J. 602 (N.M.C.M.R. 1985).
378. *Harrison v. United States*, 20 M.J. 55, 57, 59 (C.M.A. 1985) (compare Judge Cox's strong endorsement of taking additional evidence with Chief Judge Everett's more limited approach); *United States v. Tucker*, 20 M.J. 602 (N.M.C.M.R. 1985).
379. R.C.M. 908(b)(2).
380. R.C.M. 908(b)(3); DA Pam. 27-173, para. 23-7.
381. Id.

382. See United States v. Browers, 20 M.J. 542, 550 (A.C.M.R.), rev'd, 20 M.J. 356 (C.M.A. 1985). In United States v. Mayer, 21 M.J. 504 (A.F.C.M.R. 1984) the failure to request the delay for a government appeal was strictly construed against the government.

383. R.C.M. 908(b)(4).

384. R.C.M. 908(b)(5).

385. R.C.M. 908(b)(6); AR 27-10, para. 13-3b; DA Pam. 27-173, para. 23-7.

386. Id.

387. Id.

388. DA Pam. 27-173, para. 23-7.

389. Id.

390. R.C.M. 908(b)(7).

391. R.C.M. 908(c)(1).

392. Id.

393. R.C.M. 908(c)(2).

394. See, e.g., United States v. Turk, 24 M.J. 277, 278 (C.M.A. 1987); United States v. Burris, 21 M.J. 140, 144 (C.M.A. 1985); United States v. Austin, 21 M.J. 592, 596 (A.C.M.R. 1985); United States v. Lewis, 19 M.J. 869, 870 (A.F.C.M.R. 1985). See also United States v. Browers, 20 M.J. 542, 549 n.5 (A.C.M.R. 1985), rev'd on other grounds, 20 M.J. 356 (C.M.A. 1985); United States v. Poduszczyk, 20 M.J. 627, 631 (A.C.M.R. 1985). In United States v. Fowler, 24 M.J. 530, 532 (A.F.C.M.R. 1987) the Air Force Court said:

[W]e are bound by the military judge's findings unless they are not fairly supported by the record or are clearly erroneous. United States v. Burris, 21 M.J. 140 (C.M.A. 1985); United States v. Heupel, 21 M.J. 589 (A.F.C.M.R. 1985); United States v. Mayer, 21 M.J. 504 (A.F.C.M.R. 1985).

United States v. Postle, 20 M.J. 632, 636 (N.M.C.M.R. 1985).

395. UCMJ art. 62(c) provides, "In ruling on an appeal under this section, the Court of Military Review may act only with respect to matters of law." This language is similar to that in UCMJ art. 67(d) which provides, "The Court of Military Appeals shall take action only with respect to matters of law." See United States v. Burris, 21 M.J. 140, 143 n.6 (C.M.A. 1985); United States v. Turk, 24 M.J. 277, 278 (C.M.A. 1987).

396. See United States v. Turk, 24 M.J. 277, 278 (C.M.A. 1987).

397. See United States v. Austin, 21 M.J. 592, 596 (A.C.M.R. 1985); United States v. Scott, 24 M.J. 578, 583, 586 (N.M.C.M.R. 1987) ("wholly unsupported" or "entirely unsupported" by the evidence used); United States v. Yingling, 20 M.J. 593, 594 (N.C.M.R. 1985).

398. See United States v. Burris, 21 M.J. 140, 143-144 (C.M.A. 1985); United States v. Posner, 764 F.2d 1535, 1537 (11th Cir. 1985), quoted with approval in United States v. Austin, 21 M.J. 592, 596 (A.C.M.R. 1985). Federal courts consistently apply a clearly erroneous test to the district court's findings of fact related to matters other than guilt. See, e.g., United States v. Frey, 735 F.2d 350, 352 (9th Cir. 1984) (review of the factual finding that exclusion of time from speedy trial computations "served the ends of justice" was limited to determining whether the finding is clearly erroneous); United States v. Turpin, 707 F.2d 332, 334 (8th Cir. 1983) (issue of consent to search is usually a factual decision subject to clearly erroneous standard); United States v. Jabara, 644 F.2d 574, 577 (6th Cir. 1981) (clearly erroneous standard applies to appellate court even when appellate record consists entirely of documentary evidence); United States v. Page, 302 F.2d 81 (9th Cir. 1962) (en banc). The "clearly erroneous" standard was accepted by the Army Court in United States v. Rodriguez, 23 M.J. 896, 898 (A.C.M.R. 1987).

399. R.C.M. 908(c)(3); DA Pam. 27-173, para. 23-8.

400. Id.

401. R.C.M. 908(c)(3); DA Pam. 27-173, para. 23-8. See, e.g., United States v. Abell, 22 M.J. 183 (C.M.A. 1986) (interlocutory order) (petition for stay denied).

402. See, e.g., United States v. Abell, 23 M.J. 99, 102 (C.M.A. 1986); United States v. Burris, 21 M.J. 140, 144 (C.M.A. 1985).

403. See, e.g., United States v. Solorio, 21 M.J. 512 (C.G.C.M.R. 1985), aff'd, 21 M.J. 251 (C.M.A. 1986), aff'd, 107 S.Ct. 2924 (1987); United States v. Abell, 23 M.J. 99 (C.M.A. 1986); United States v. Scott, 24 M.J. 578 (N.M.C.M.R. 1987). In United States v. Clarke, 23 M.J. 519, 521 (A.F.C.M.R.), aff'd, 23 M.J. 352 (C.M.A. 1986) the trial judge's determination that the off-post rape lacked service connection was reversed because his "conclusions to the contrary are not supported by the evidence of record."

404. 19 M.J. 795 (A.C.M.R.), rev'd, 20 M.J. 353 (C.M.A. 1985).

405. United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985); Wickham v. Hall, 12 M.J. 145 (C.M.A. 1981), aff'd, 706 F.2d 713 (5th Cir. 1983).

406. See United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985). See also United States v. Clardy, 13 M.J. 308 (C.M.A. 1982). United States v. Moore, 22 M.J. 523 (A.F.C.M.R. 1986) (The military judge's determination that administrative processing was the "functional equivalent" of discharge was reversed. The opinion fails to mention the date of delivery of a discharge certificate).

407. See United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985). See, e.g., United States v. ex rel. Toth v. Quarles, 350 U.S. 11 (1955); United States v. ex rel. Hirshberg v. Cooke, 336 U.S. 210 (1949); Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866).

408. United States v. Moore, 22 M.J. 523 (N.M.C.M.R. 1986) (trial judge reversed).

409. Cooley and Scott, supra note 306, at 41.

410. United States v. Jones, 21 M.J. 819 (N.M.C.M.R. 1985). However, in United States v. Burris, 21 M.J. 140, 144 (C.M.A. 1985) the issue of the government's ability to go to trial remained an issue.

411. 22 M.J. 904, 905 (N.M.C.M.R. 1986), rev'd 23 M.J. 280 (C.M.A. 1987).

412. See United States v. Miniclier, 23 M.J. 843 (A.F.C.M.R. 1987).

413. United States v. Jones, 22 M.J. 515 (N.M.C.M.R. 1985). In United States v. Ivester, 22 M.J. 933 (N.M.C.M.R. 1986), the Navy-Marine Court held that the trial judge erroneously relied on United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971) to find a speedy trial violation. But see United States v. Harvey, 23 M.J. 280 (C.M.A. 1987). The Ivester Court said that even if Burton applied, as a matter of law, the government proceeded with reasonable diligence and therefore no speedy trial violation occurred. Id. at 938.

414. United States v. Turk, 24 M.J. 277 (C.M.A. 1987).

415. The military judge felt that the restriction to the ship while it was in port was a condition on liberty under R.C.M. 304(a)(1). See United States v. Bradford, 24 M.J. 831, 833 (N.M.C.M.R.), aff'd, 25 M.J. 181 (C.M.A. 1987) initiation of a "condition on liberty" starts the speedy trial clock under R.C.M. 707(a). See United States v. Bradford, 24 M.J. 831, 833 (N.C.M.R.), aff'd, 25 M.J. 181 (C.M.A. 1987).

416. See United States v. Fowler, 24 M.J. 530 (A.F.C.M.R. 1987). See also United States v. Lilly, 22 M.J. 631 (N.M.C.M.R. 1986) (military judge erroneously considered the impact of unauthorized absence on exclusion of time determination for speedy trial).

417. United States v. Leonard, 21 M.J. 67 (C.M.A. 1985). See also United States v. Harrison, 22 M.J. 535 (N.M.C.M.R. 1986) (trial judge's dismissal of the charges was based on an erroneous theory that the start of the speedy trial "clock" was preferral of the charges after 1 August 1984).

418. The offense originally preferred and served on the accused was desertion. See United States v. Blair, 21 M.J. 981, 982 (N.M.C.M.R. 1986).

419. In Blair, if amending the charge sheet to allege unauthorized absence vice desertion operated to dismiss the original desertion charge, and if reinstatement of the desertion charge required repreferral, then trial would be barred by the statute of limitations. See United States v. Arbic, 16 C.M.A. 292, 36 C.M.R. 448. (1966); United States v. Simpson, 11 M.J. 715 (N.M.C.M.R. 1981). The Navy-Marine Court of Military Review determined that the original desertion charge was not dismissed, and therefore repreferral was not required. See United States v. Blair, 21 M.J. 981 (N.M.C.M.R. 1981).

420. United States v. Harrison, 23 M.J. 907 (N.M.C.M.R. 1987).

421. 21 M.J. 592 (A.C.M.R. 1985). See also United States v. Heupel, 21 M.J. 589 (A.F.C.M.R. 1985) (trial judge's determination that government failed to prove by clear and convincing evidence that the seizure of the urine was a valid inspection upheld).

422. 23 M.J. 896 (A.C.M.R. 1987). In United States v. Rodriguez, 23 M.J. 896 (A.C.M.R. 1987) the Army Court commented that the trial judge's ruling that if disciplinary action will always result from a finding of drug use through urinalysis, then the primary purpose is automatically disciplinary was clearly erroneous. However, in United States v. Austin, 21 M.J. 592 (A.C.M.R. 1985) the trial judge correctly determined that the primary purpose of a particular urinalysis test was disciplinary.

Therefore, the urinalysis test result was not admissible.
See Mil. R. Evid. 313(b).

423. United States v. Hilbert, 22 M.J. 527 (N.M.C.M.R. 1986) (testing procedures); United States v. Scholz, 19 M.J. 837 (N.M.C.M.R. 1984) (allowing a non-Department of Defense certified laboratory to conduct a retest of the urine sample).

424. 21 M.J. 504 (A.F.C.M.R. 1985).

425. Id.

426. 20 M.J. 806 (N.M.C.M.R. 1985).

427. 18 U.S.C. sec. 3500 (1985), quoted in United States v. Derrick, 21 M.J. 903, 904-905 (N.M.C.M.R. 1986).

428. 21 M.J. 903 (N.M.C.M.R. 1986).

429. United States v. Ostrander, Misc. Dkt. No. 84-06 (N.M.C.M.R. 19 Dec. 1984) (memo. op.), pet. withdrawn by defense, 20 M.J. 362 (C.M.A. 1985). See also, Cooley and Scott, supra note 306, at 43.

430. 24 M.J. 114 (C.M.A. 1987).

431. 19 M.J. 933 (N.M.C.M.R. 1985).

432. 22 M.J. 527 (N.M.C.M.R. 1987).

433. 20 M.J. 602 (N.M.C.M.R. 1985).

434. 25 M.J. 579 (C.M.A. 1988).

435. United States v. Humphries, 636 F.2d 1172 (9th Cir. 1980); United States v. Scholz, 19 M.J. 837, 840 (N.M.C.M.R. 1984); United States v. Helstoski, 442 U.S. 477 (1979); In Re Special September 1978 Grand Jury II, 640 F.2d 49 (7th Cir. 1980); United States v. Scholz, 19 M.J. 837, 840 (N.M.C.M.R. 1980).

436. See United States v. Lasker, 481 F.2d 229 (2d Cir. 1973), cert. denied, 415 U.S. 975 (1974); United States v. Igoe, 331 F.2d 766 (7th Cir. 1964), cert. denied, 380 U.S. 942 (1965), cited with approval in Dettinger v. United States, 7 M.J. 216, 222 (C.M.A. 1979).

437. United States v. Browers, 20 M.J. 356 (C.M.A. 1985).

438. 107 S.Ct. 2924 (1987).